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# IN THE SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1958

No. 546

CITY OF MERIDIAN
APPELLANT

*v.*

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY
APPELLEE

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH DISTRICT

# STATEMENT AS TO JURISDICTION

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## LIST OF CASES CITED AS AUTHORITY FOR THE PROPOSITION THAT THE QUESTIONS PRESENTED ARE SUBSTANTIAL

*Bankers Trust Company v. Raton*, 258 U. S. 328

*Hodges v. Western Union Telegraph Co.*, 72 Miss. 910, 18 So. 84, 29 L. R. A. 770

*Memphis v. Postal Telegraph and Cable Company*, 145 Fed. 602 (Circuit Court's Opinion) 139 Fed. 707 (District Court's Opinion)

*Russell v. Sebastian*, 233 U. S. 195

*St. Louis v. Western Union Telegraph Co.*, 149 U. S. 465

*Southern Telegraph Company v. A. G. S. Railroad Co.* 1 Miss. Dec. Hemmingway & McDonald 489

## LIST OF CASES CITED AS AUTHORITY FOR THE PROPOSITION THAT THIS COURT HAS JURISDICTION

*Chicago v. Atchinson, Topeka and Santa Fe Ry. Co.*, 357 U. S. 77, 82, 2 L. Ed. 2d 1174, 78 S. Ct. 1063

*City of Detroit v. Murray Corporation*, 355 U. S. 489, 2 L. Ed. 2d 441, 78 S. Ct. 458

*Ex Parte Buder*, 271 U. S. 461, 70 L. Ed. 1036, 46 S. Ct. 557

*Hayes v. Seattle*, 251 U. S. 233, 64 L. Ed. 243, 40 S. Ct. 125

*Louisville and N. R. Co. v. Green*, 244 U. S. 522, 61 L. Ed. 1291, 37 S. Ct. 683

*Moore v. Fidelity and Deposit Co.*, 272 U. S. 317, 71 L. Ed. 273, 47 S. Ct. 105

*St. Louis I. M. & S. R. Co. v. Hasty*, 255 U. S. 252, 65 L. Ed. 614, 41 S. Ct. 269.

*Watson v. Employers Liability Assur. Co.*, 348, U. S. 66, 70 75 S. Ct. 166, 99 L. Ed. 74, 80

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APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## STATEMENT AS TO JURISDICTION

The Appellant, pursuant to United State Supreme Court Rules 13(2) and 15, file this their statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the final judgment rendered by the United States Court of Appeals for the Fifth Circuit affirming the judgement of the United States District Court for the Southern District of Mississippi, granting the relief prayed by Appellee as plaintiff in said Court.

### OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit was rendered on June 9, 1958, and is reported in 256 F. 2d at page 83, and a copy thereof is appended hereto (appendix p. 1.), pursuant to Rule 15 (1) and (h). The opinion of the United States District Court for the Southern District of Mississippi was filed on September 6, 1957, and is re-

ported in 154 F. Supp. at page 736, and a copy thereof is appended hereto: (Appendix p. 13) The judgment of the District Court is set out in Note 1 of the opinion of the Court of Appeals. No finding of fact or conclusion of law was made by either court separate from the reported opinion.

## JURISDICTION

The appeal to the Court of Appeals was by Appellant here from a judgment entered in the United States District Court for the Southern District of Mississippi on September 16, 1957. The judgment in the District Court was rendered in an action by Appellee against Appellant under 28 U. S. C., 2201. Appellee sought and obtained a declaratory judgment that Appellant was not entitled to collect from Appellee the charges authorized by Section 5 (3) of Chapter 372 of the Laws of 1956 (Mississippi Code of 1942 Recompiled, Section 7716-05 (e)). Appellee claimed in the Courts below that the statute referred to was invalid as against it because of the limitations imposed by Article I, Section 10 (Contracts Clause) and Amendment 14 (Due Process Clause) of the Constitution of the United States.

The pertinent parts of the statute of the State of Mississippi held to be unenforceable by Appellee as against Appellant are as follows:

Section 7716-05 (e), Mississippi Code of 1942, Revised:

"(e) In addition to such other rights as it may have to use the streets, alleys and public places of a municipality, a public utility which holds a certificate of public convenience and necessity granted under the provisions of this act covering the geographical area of such municipality, and which (1) is operating under a municipal franchise on the effective date of this act, or (2) shall have previously operat-

ed under such a municipal franchise which has expired within five (5) years prior to the effective date of this act, or (3) which shall hereafter operate under a municipal franchise hereafter granted, may, after the expiration of any such franchise continue to use the streets, alleys and public places therein situated upon condition that (1) such utility shall pay the said municipality compensation therefor at the rate of two percent (2%) of said utility's gross revenues from sales to residential and commercial customers within said municipality, in case of a utility defined in Section 1 D (1) and 1 D (2) (§7716-01) and *in the case of a utility defined in 1 D (3) (§7716-01) the said utility shall pay two per cent (2%) of the monthly service charges in said municipality whether said utility has a franchise to operate therein or not*, such payments to be made quarterly of each year after the effective date of this act, and (2) that after the expiration of such franchise the municipality, or any customer of such utility in such municipality, upon appropriate petition, shall be entitled to a hearing as to whether or not the certificate of convenience and necessity may then and thereafter be granted on a permanent basis as herein set out. Any co-operative which shall operate within any area of a municipality shall likewise pay such municipality two per cent (2%) of the cooperative's gross revenue from sales to residential and commercial customers within said municipality. Any municipality shall have the right to acquire by purchase, negotiation or condemnation the facilities of any utility that is now or may hereafter be located within the corporate limits of such municipality."

(Emphasis indicates portion of said law imposing charge on Appellee)

The definition referred to in the above quoted subsection pertinent here is Section 7716-01 D (3), which reads as follows:

"D. The term 'public utility' when used in this act, includes persons and corporation, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for:

* * * *

(3) The transmission, conveyance or reception of any messages over wire or by radio or otherwise, of writing, signs, signals, pictures and sounds of all kinds by or for the public, where such service is offered to the public for compensation, . . . "

The appeal herein is from the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 9, 1958; as to which petitions for rehearing were filed on June 27, 1958, and within the time allowed therefor by Rule 29 of the Rules of the United States Court of Appeals for the Fifth Circuit; which petitions for rehearing were not overruled until August 4, 1958, so that said judgment of June 9 did not become effective until the latter date. Notice of Appeal to this Court was served on Appellee and filed in the Court below on October 3, 1958.

This appeal is brought pursuant to Title 28, U. S. Code, Section 1254, (2). The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case:

*Chicago v. Atchison, Topeka and Santa Fe Ry. Co.*, 357 U. S. 77,82, 2 L. Ed. 2d 1174, 78 S. Ct. 1063; *City of Detroit v. Murray Corporation*, 355 U. S. 489, 2 L. Ed. 441, 78 S. Ct. 458; *Watson v. Employers Liability Assur. Co.*, 348 U. S. 66, 70, 75 S. Ct. 166, 99 L. Ed. 74, 80; *Louisville and N. R. Co. v. Green*, 244 U. S. 522, 61 L. Ed. 1291, 37 S. Ct. 683; *Hayes v.*

*Seattle*, 251 U. S. 233, 64 L. Ed. 243, 40 S. Ct. 125; *St. Louis I. M. and S. R. Co. v. Hasty*, 255 U. S. 252, 65 L. Ed. 614, 41 S. Ct. 269; *Ex Parte Buder*, 271 U. S. 461, 70 L. Ed. 1036, 46 S. Ct. 557; *Moore v. Fidelity and Deposit Co.*, 272 U. S. 317, 71 L. Ed. 273, 47 S. Ct. 105.

## QUESTIONS PRESENTED

In 1886 the Legislature of the State of Mississippi passed an act which Appellee contended was an offer to telephone companies of an irrevocable, perpetual, and assignable franchise to use all public streets, highways, roads and public places in the State of Mississippi, for their telephone lines without the necessity of ever having to pay compensation therefor, or any charge thereon. Appellant contends that this act was passed only for the purpose of giving telephone companies the right of eminent domain and a revocable license to use the streets, etc. In 1956 the Mississippi Legislature enacted Chapter 372 of the Mississippi Laws of 1956, which provided for a charge of two percent of local gross revenues to be paid to municipalities whose streets, etc., would be used by public utilities. Appellee, contending that its predecessors in title had accepted the alleged offer prior to the repeal of the Act of 1886, here asserts an irrevocable franchise to use, without charge, the streets, etc., in the manner in which they are now using them. They contend that Chapter 372 of the Mississippi Laws of 1956, insofar as it seeks to impose such charge, impairs the obligation of the alleged contract with their predecessors, and is, therefore, a violation of Article I, Section 10 of the Constitution.

Appellant contends that Chapter 38 of the Mississippi Laws of 1886 did not constitute an offer to contract, but was only the grant of the right of eminent domain with a

revocable license. It contends that this is shown by the wording of the Act, its history, and the actions of Appellant's predecessors. Appellant contends, further, that if a binding contract was ever executed, Appellee has exceeded its rights thereunder and, therefore, the charge can be imposed without violating the Constitution.

Appellant also contends that the procuring of a franchise by Appellee's predecessor from Appellant places them in exactly the same position as the water company involved in *Bankers Trust Company v. Raton*, 258 U. S. 328, which was held to be estopped to now claim a statewide franchise.

These questions may be enumerated as follows:

1. Does Federal Law, and particularly Constitution Article I, Section 10, render invalid the enactment of the Mississippi Legislature (Chapter 372 of the Laws of 1956) authorizing Appellant to collect a rental charge from Appellee for the use of streets, alleys and other public places for the erection and maintenance of its facilities? On this appeal, this question involves the following subordinate considerations.

a. Does Federal Law, i. e. the decisions of this Court, require the holding of the Courts below that use and occupation of highways, streets, etc., from 1886 to 1890, by Appellee's predecessors, resulted in a contract with the State whereby Appellee now has a contractual right under Chapter 38 of the Laws of 1886, to use the highways and streets without charge?

b. Is there any conflict between the decisions of this Court, exemplified by the case of *St. Louis v. Western Union Telegraph Co.*, 149 U. S. 465, recognizing the

power of the sovereign states to exact charges from public utilities for the use of its streets, alleys, etc.: and the case of *Russell v. Sebastian*, 233 U. S. 195, and cognate decisions, denying the right of the sovereign to cancel or limit a franchise previously granted and accepted?

c. If there is no conflict between *St. Louis*, supra, and *Sebastian*, supra, did Chapter 38 of the Mississippi Laws of 1886, constitute an offer by the State to grant a perpetual franchise which could not be revoked under Constitution Article I, Section 10, which included the right to use highways and streets free of charge?

d. Did Chapter 38 of the Mississippi Laws of 1886 violate Amendment XIV of the United States Constitution by discriminating against individuals?

e. In determining the meaning, scope and effect of Chapter 38 of the Laws of 1886, will this court give controlling or persuasive effect to the contemporaneous decision of the Supreme Court of Mississippi which adopted the interpretation given 2 Mo. Rev. State. 1855 (see Appendix p. 51.) by this court in *St. Louis v. Western Union Telegraph Co.*, supra?

2. If Chapter 38, Mississippi Laws of 1886 was an offer to contract and was accepted by Appellee's predecessors:

a. Is the sovereignty of the State of Mississippi to be abrogated by implication? Specifically is the meaning of the language in the offer to be limited to its ordinary meaning or stretched to make "on, across and along" include "under". Is the meaning of the language in the offer to be further stretched to include uses not contemplated at the time and streets, etc. not occupied,

constructed, dedicated, nor even planned at that time?

b. Was such contract perpetual and assignable?

3. If Chapter 38, Mississippi Laws of 1886 resulted in a contract authorizing Appellee's predecessors to use all streets, etc. in the manner they are now being used free of charge, is Appellee now estopped to claim such free use perpetually because its predecessor failed to pay taxes on such franchise and accepted a franchise from this Appellant when its rights were challenged, which new franchise was limited in time and provided for compensation to the City?

4. If Appellee had the right to assert its claim under such alleged contract with the State of Mississippi, would it not be required to first offer to do equity by paying taxes on the property right claimed by it from the time of its inception until the filing of this action?

All of the foregoing questions relate to and arise out of the general proposition asserted by Appellee that it is immune from any charges for use of the public lands and thoroughfare dedicated to public use, and from charges for the supervision, control and regulation of such use by the State of Mississippi or any of its instrumentalities or municipalities. This immunity, as sustained by the Courts below, must arise from Chapter 38 of the Mississippi Laws of 1886, as construed under Article I, Section 10, of the Constitution of the United States.

## STATEMENT OF THE CASE

Appellee brought this action for a declaratory judgment that Appellant was precluded from collecting the charges provided for in Section 5 (e) of Chapter 372 of the Mississippi Laws of 1956, because of an alleged contract between

Appellee and the State of Mississippi giving Appellee the free use of the highways, streets, alleys and other public places within the State. This contract was alleged to have resulted from the acceptance by Appellee's predecessors of an offer by the State of Mississippi embraced in Chapter 38 of the Laws of 1886, by the erection of poles, lines, etc., after the 1886 enactment.

In its complaint, Appellee invoked jurisdiction both on the ground of diversity and that a Federal (Constitutional) question was involved. The complaint alleged that the enforcement of the 1956 legislation would deprive Appellee of its property (the easement for the use of highways; streets, etc., without charge) without due process of law; and that the exaction of such charge would be in violation of its contract with the State contrary to Article I, Section 10, of the United State Constitution.

On the issues joined, the threshold question was whether or not the Act of 1886 amounted to an offer to contract for the free easement claimed by Appellee. In this, Appellant relied upon the case of *Hodges v. Western Union*, 72 Miss. 910, 18 So. 84, 29 L. R. A. 770, following *St. Louis v. Western Union*, 149 U. S. 465; and antecedent and subsequent cases from this Court in line therewith. Appellee relied upon *Russell v. Sebastian*, 233 U. S. 195, and cognate cases.

Appellant contended in the Courts below, and contends here, that there is no conflict between these decisions; that the first line of cases establishes the right of the soverign, either directly or through its instrumentalities, to exact a charge for the use by the utility of its streets, alleys, etc.; while the second line of cases, relied on by Appellee, does

no more than reassert the rule that a franchise may be a contract, and when so established, may not be modified or forfeited by unilateral action, contrary to the terms thereof.

The facts in this case have all been stipulated and the only dispute with reference to such facts is in the conclusions to be derived therefrom. Such facts consist largely of the history of the establishment and growth of telephone companies in the State of Mississippi with specific reference to the incorporation and consolidation of the corporations which are Appellee's predecessors in title.

Such history shows that prior to 1876, telegraph companies had been given the right by Mississippi to erect their posts, etc. along streets, highways and other public places. *Mississippi Code of 1857*, Chapter 35, Article 45-49. This statute has been brought forward into the present laws of this state. Therefore, no purpose existed in 1886 to grant telegraph companies the right to use such streets and highways. However, in 1885 the Supreme Court of Mississippi held in *Southern Telegraph Co. v. A. G. S. R. R. Co.*, 1 Miss. Dec. (Hemmingway and McDonald) 489, that the right of eminent domain which had previously been given to telegraph companies by Chapter 135 of the Mississippi Laws of 1876 (see Appendix p. 39) had been repealed. At the very next session of the legislature Chapter 38 of the Mississippi Laws of 1886 was introduced in the Mississippi Senate in such form as to apply only to telegraph companies (Mississippi Senate Journal 1886, pp. 338, 339). Appellant contends that since telegraph companies already had the right to use streets and highways that the sole purpose of this statute was to re-enact said Chapter 135 and restore the right of eminent domain which the Supreme Court of the state held in the Southern Telegraph Company case the year before no longer existed. The history and language of the Act so indicate. Appellee contends that when the words "or tele-

phone company" were inserted into the bill in the course of its passage through the legislature, its purpose was converted to an offer of a irrevocable, perpetual and assignable contract to use all of the streets, highways and public places in the State of Mississippi free of charge, if telephone companies would establish their lines anywhere within the state. They contend this in spite of the fact that the governor of the state, who signed the bill without question, warned the legislature in his inauguration address about conferring such privileges on such private corporations. (Mississippi Senate Journal 1886, p. 45) The history of Appelle's predecessors in title show that both had already established telephone exchanges and lines in the State of Mississippi at the time of the passage of this act.

The pertinent provisions of Section 1 of Chapter 38 of the Mississippi Laws of 1886 are as follows:

> Be it enacted by the Legislature of the State of Mississippi, that any telegraph or telephone company, chartered or incorporated by the laws of this or any other state of the United States, shall, upon, making due compensation, as hereinafter provided, have the right to construct, maintain and operate telegraph or telephone lines through any public lands of this State, and on, across and along all highways, streets and roads, and across and under any navigable waters, and on, along upon the right of way and structures of any railroad and, in case of necessity, on, under or over any private lands in this State; provided, that the post arm, insulators and other fixtures of such telegraph or telephone lines be so erected, placed and maintained as not to obstruct or interfere with the ordinary use of such highways, railroads, streets or water, or with the convenience of any land owner, more than may be unavoidable."

Twelve subsequent sections of Chapter 38, Mississippi Laws of 1886, deal wholly with the right of eminent domain and proceedings to determine the "due compensation" to be paid to railroads and private owners. (The full text of this act is set out on page 28 of the Appendix hereto.)

Both the District Court and the Court of Appeals held that the passage of this act and the action of Appellee's predecessors in continuing to expand their facilities in the State of Mississippi resulted in a contract between the State and Appellee's predecessors, which was irrevocable, assignable and perpetual. They, therefore, reasoned that upon the authority of *Sebastian* and others cases cited by Appellee, any attempt to now charge Appellee for the use of streets, etc. in the State of Mississippi is a violation of Constitution Article I, Section 10. Such holding was made without reference to the case of *St. Louis v. Western Union Telegraph Company*, supra, and repudiated the holdings of the Supreme Court of Mississippi in *Hodges*, supra, decided in 1895, which followed the reasoning of this court in *St. Louis v. Western Union Telegraph Company*, sura.

Both of the Courts below, in weighing the case under Constitution Article I, Section 10, give control and effect to decisions of this Court in which statutes of other states and ordinances of other municipalities are assumed to grant franchise and in which these franchises were sought to be modified, limited or forfeited. None of these cases involved the validity of statutes laying a charge for use of such facilities. Neither was consideration given to whatever interpretation may have been placed upon the statutes granting the franchises by the local courts. Thus, the holding here under review would seem to establish a formula of Federal law for the interpretation of state statutes permitting the operation of utilities, where the meaning and effect of the

state statute is brought into question under the Contracts Clause of the Federal Constitution. Moreover, in the light of the *Hodges* case, this application of the rule is asserted by the Court below, notwithstanding it appears to result in the declaration and enforcement of a contract which the State never intended, and the grant and donation of property which the State did not intend to convey.

In 1899 in the face of the threat of continued litigation Appellee's predecessor in title applied to and was granted a franchise by The City of Meridian conferring the same rights included in the alleged grant of 1886 within the limits of The City of Meridian. This franchise was limited in time as was the franchise involved in *Bankers Trust Company v. Raton*, supra, and contained other requirements not included in the 1886 Act as well as the duty to provide compensation to the City for the use of its streets, etc. Appellant contends that by acceptance of this franchise Appellee is now estopped under the positive decision of this Court in *Bankers Trust Company v. Raton*, supra.

Chapter 38 of the Laws of 1886 was construed in 1895 by the Supreme Court of Mississippi in *Hodges, Tax Collector for the City of Meridian v. Western Union Telegraph Company*, 72 Miss. 910, 18 So. 84; 29 L. R. A. 770. This opinion is set out in the Appendix hereto on page 56. The Supreme Court of Mississippi there held that the right of the utility to occupy the public ways within the State was a revocable license, but that the City of Meridian could not thus impose and collect a charge for this use for the reason that the Legislature had not then granted such authority to its municipalities. Appellant's position is that it now has the right to collect the charge as authorized by Section 5 of Chapter 372, Laws of 1956.

In the District Court and the Court of Appeals, it was held that the pronouncement by the Supreme Court of Mississippi that the right of the utility to use streets, etc. without charge was a revocable license, was mere dictum; and that, in any event, the effect of the use and occupancy by the utilities of the streets, etc. in the State between the adoption of the Act of 1886 and the ratification of the Constitution of 1390 resulted in a contract between the State and the telephone companies then doing business within the State, for the continued and perpetual use of such streets, etc., without the exaction of any charge for this use. Both Courts ignored the fact that, in making the statement labelled "dictum", the Supreme Court of Mississippi was following the positive adjudication of this Court in *St. Louis v. Western Union Telegraph Company* 149 U. S. 465, supra, that a similar Missouri Statute granted a revocable license only. This Missouri Statute is set out on page 51 of the Appendix hereto.

The Courts below held that, as to Appellee, the above-quoted portion of Section 5 (e) of Chapter 372 of the Mississippi Laws of 1956 was inoperative and of no effect, and that to allow Appellant to collect the charge therein authorized against Appellee would be in violation of Article 1, Section 10 of the Constitution of the United States.

Therefore, it is submitted that jurisdiction is conferred upon this Court by Title 28, U. S. Code, Section 1254 (2). Notwithstanding the restrictions placed on appeals generally, it is submitted that the federal questions involved embrace the matter of whether or not, under the controlling decisions of this Court, the use and occupation of ways within the State of Mississippi by Appellee's predecessor from the year 1886 through the year 1890 resulted in a contract between the State and the utility, any unilateral modi-

fication of which by the State would be in contravention of Article I, Section 10 of the Constitution. Moreover, the question of whether or not any such rights as claimed by Appellee survive the enactment of Section 5 (e) of Chapter 372 of the Mississippi Laws of 1956, requires the determination of the effect of the conduct of Appellee pursuant to subsequent Constitutional provisions and legislation by the State. The question here for determination is whether or not, at the present time, the State of Mississippi is without power to authorize its cities and instrumentalities to collect a charge for the use of streets, etc., from Appellee, because of the prohibition of Article I, Section 10 of the Constitution of the United States.

## THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The holdings of the Courts below are that, as a proposition of Federal law, a contract, within the meaning of the Contracts Clause of the United States Constitution, now exists between the State of Mississippi and Appellee, under which appellant may use the properties of the State, and the State is precluded, either directly or through any of its instrumentalities or municipalities, from exacting any charge for the use made and to be made by Appellee for the carrying on of its various enterprises under its charter and franchise rights as a telephone company. This contract is held to subsist by virtue of the Constitution and laws of the United States, as a result of the provisions of Section 1 of Chapter 38 of the Mississippi Laws of 1886 (an eminent domain statute) and the use and occupation of streets, etc., by Appellee's predecessor prior to the adoption of the Mississippi Constitution of 1890.

It is obvious from Section 1 of Chapter 38 of the Laws of 1886 that this legislation was supplemental to other gen-

eral laws providing for the power of eminent domain, and the provisions of charters granted to other public service corporations (specifically, toll roads and railroads) by special acts of the Legislature. The situation in Mississippi at the time of the adoption of the Act of 1886 was no different from that which had obtained in numerous other states, the period being one of transition from special legislative grants of charter powers which, in the case of public utilities and service corporations, also conferred the right of eminent domain, as a charter power; to a system of incorporation and regulation and the authorization of condemnation proceedings by general law. Thus, while the judgment below deprives only Mississippi of its property and birthright as a sovereign state, the rationale of the Court below is subject to application to most, if not all, of the other states.

The rule announced below not only erects a barrier against Appellant in this case, but all other municipalities within the State. Not only does the rule preclude municipalities from collecting the charges provided in Chapter 372 of the Laws of 1956, but also inhibits any future and further legislation for the exercise of the proprietary rights of the State, not only as to the property situated within the territorial limits of municipalities but as to all ways throughout the State. This proprietary interest or property rights asserted by Appellee extends, not only to the highways, roads and streets existing in 1886 and coming into being prior to 1890, but applies to lands acquired and yet to be acquired by the State, its instrumentalities and all municipalities then in existence and coming into being since that time. Moreover, the land involved is not limited to the rights of way and thoroughfares, but, under the terms of the Act of 1886, extends "through any public lands of this State," whatever that may be held to mean.

As noted above, the statute in question was conceived and inspired during the transition from the complicated and unmanageable system of special charter and franchise grants by special acts; to incorporation, control and regulation under general law; which transition already had made great progress in other states, the examples of which were emulated by Mississippi. Thus, the problem confronting Mississippi is one which may well arise in a majority of other states. Since all of the states presently are engaged in the acquisition of lands for the construction and maintenance of super highways, as well as for the location of new thoroughfares and the re-location of many of long standing; whether by condemnation or purchase, these lands will become available for use by Appellee, which use increases the burden imposed upon the servient estate. There being no clear definition or formula by which the damages or value to be attributable to the use to be made by Appellee can be determined, both negotiations and judicial proceedings are fraught with such uncertainty as to make sure that inequalities in the prices or damages paid as between different private owners will be the rule, and that injustices will result, either to the sovereign and the public, or to the persons whose property is to be appropriated to public use. Moreover, under the rule announced below, Mississippi and all of the other states of the Union will be called upon to do justice to the owners of land by paying from the public funds for rights and interest in land to be held and enjoyed exclusively by Appellee in the pursuit of its business for its own profit.

The decisions below have not only deprived this political subdivision of a part of its sovereignty, but has deprived the States of Mississippi, and threatens to deprive other states, of a part of that sovereignty reserved to them by the Tenth Amendment of the Federal Constitution. This element

of sovereignty has not been held to now rest in the Federal Government, but in a private corporation. Under the rule announced, it has been surrendered to such corporation irrevocably by a legislative action which obviously intended no such result.

The rule announced also directly conflicts with the earlier decisions of this Court in *St. Louis v. Western Union Telegraph Co.*, and *Bankers Trust Co. v. Raton*, supra, and of the Court of Appeals, Sixth Circuit, in *Memphis v. Postal Telegraph and Cable Co.*, 145 Fed. 602. The opinion of the Court of Appeals below sought to resolve the conflict with the Sixth Circuit on the ground that an earlier statute had granted Memphis the right to charge for the use of its streets. However, they overlooked the decision of the case in the District Court (139 Fed. 707 at pp. 710-711) showing clearly that the original grant to the utility of the use of the streets, etc. in the State antedated any grant to the City of Memphis. Neither Court sought to distinguish *St. Louis* or *Bankers Trust Co.*, but both have in effect overruled them by implication.

While the issues and appropriate procedure did not permit the record to so demonstrate, the inclusion of Section 5 (e) in Chapter 372 of the Mississipip Laws of 1956 was an effort to alleviate a problem of long standing within the State. Since the days of the depression of 1929-33, new taxes have been devised by the State to provided for its own program and those of the counties; while limits have been imposed upon the levy and collection of ad valorem or property taxes, with the result that municipalities have been improverished, while more than adequate provision has been made for State activities. In the adoption of the 1956 legislation, the policy of centralizing control and regulation of utilities, thus re-

lieving municipalities of a great deal of their regulatory functions, was coupled with the grant of power to cities and towns to exact a fee and charge, such as could have been exacted by the State, not only for the use of properties belonging to the State and its municipalities, but for the cost of regulation itself. These charges have been upheld uniformly by this Court and the Courts of every state where they have been brought into question. Thus, Appellant submits, with deference, that this Court may find this case an appropriate one for reversal without further argument, with directions to the Courts below, that the complaint of Appellee in the District Court should be dismissed on its merits.

## CONCLUSION

WHEREFORE, it is respectfully submitted that this Court has jurisdiction of this appeal under Section 1254 (2), Title 28, United State Code. It is further submited that, unless this Court should see fit to reverse and remand for dismissal, this Court should reaffirm the true holdings of its former decisions reconciling any apparent conflict therein that may have led the Courts below into errors reflected by this record.

Respectfully submitted,
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## CERTIFICATE

I, the undersigned Lester E. Wills, one of the attorneys for Appellant herein, hereby certify that I have served the foregoing Statement as to Jurisdiction upon Mr. Charles B. Snow, Milner Building, Jackson, Mississippi, Mr. O. Winston Cameron, Threefoot Building, Meridian, Mississippi, and Mr. John A. Boykin, Attorney, Southern Bell Telephone and Telegraph Company, Atlanta, Georgia, by mailing to each of them a true copy of said Statement as to Jurisdiction, together with a copy of the Appendix filed therewith.

Witness my signature this the day of November, 1958.

---

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JAMES R. BROWNING, Clerk

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# APPENDIX TO STATEMENT AS TO JURISDICTION

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# IN THE SUPREME COURT OF THE UNITED STATES

**No._____**

CITY OF MERIDIAN
APPELLANT

*v.*

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY
APPELLEE

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## OCTOBER TERM, 1958

Before HUTCHESON, Chief Judge, and TUTTLE and WISDOM, Circuit Judges.

HUTCHESON, Chief Judge: Brought by Appellee against the City of Meridian under Sec. 2201, U.S.C., the suit was for a declaratory judgment that Sec. 5(e) of House Bill 123, Chapter 372, Mississippi Laws of 1956, insofar as it requires plaintiff to pay two percent of the monthly service charges within its boundaries as compensation for use of its streets, alleys, and other public places, was unconstitutional and invalid.

The claim was.

1. That the plaintiff holds a perpetual and irrevocable grant from the State of Mississippi to use and occupy all highways and streets in the City of Meridian, Mississippi, without paying compensation therefor; that this grant is a contract which is protected under the contract clauses of the State and Federal Constitutions and which cannot be impaired by the imposition of additional burdens such as the exaction of compensation. We, of course, recognize the right of the City to make reasonable regulations under the police power.

2. That insofar as the statute relied upon by the City (Sec. 5(e) Chapter 372, Mississippi Laws of 1956) requires plaintiff to pay compensation to the City for the use of the streets, said statute constitutes an unconstitutional attempt to impair the obligations of the contract between plaintiff and the State of Mississippi.

Appellant filed an answer and counter-claim, admitting the enactment of Chapter 38 of the Mississippi Laws of 1886 and the construction, extension and expansion of the telephone plant and facilities of the appellee's predecessors in title subsequent to the enactment of said Chapter 38, but denying that this extension or expansion was conducted under Chapter 38 of the Mississippi Laws of 1886, and denying that Chapter 38 of the Mississippi Laws of 1886 constituted an offer of a franchise. Appellant further denied that appellee succeeded to any rights under Chapter 38 of the Mississippi Laws of 1886. It, however, admitted

that it was seeking to collect two percent of appellee's monthly service charges in said municipality. Defendant's counter-claim asked that appellee be required to discover the amount of its monthly service charges in the City of Meridian for the period from March 29, 1956, through December 31, 1956, and subsequent thereto during the pendency of this action, and that judgment be rendered against appellee for two percent of the total of said service charges.

Upon the issues thus drawn by the pleadings, the case was tried to the court without a jury on stipulations of fact and documentary evidence, and at the conclusion of the trial the district judge, making and filing an opinion, *Southern Bell Telephone & Telegraph Co. v. City of Meridian*, 154 F. Supp. 736, in which he set out the uncontroverted facts and canvassed and discussed the applicable decisions upon which he based his determination, entered judgment[1] for plaintiff, and the City appealed.

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[1] "This cause came on this day to be heard on evidence submitted to the Court and briefs of counsel, and the Court having heard and considered the same doth order, adjudge, decree and declare as follows:

"1. That Chapter 38, Mississippi Laws of 1886, constituted an offer by the State of Mississippi which was accepted by the acts of Southern Bell Telephone and Telegraph Company and its predecessors in title by the continued maintenance, construction, extension and expansion of telephone facilities on and along the public highways and streets of the State continuously during each and every year subsequent thereto to date.

"2. That this offer and acceptance resulted in a contract by virtue of which Southern Bell Telephone and Telegraph Company acquired a vested right to use all present and future highways and streets of the State of Mississippi for the purpose of constructing and maintaining its telephone lines and communication facilities without payment of compensation therefor; and Southern Bell Telephone and Telegraph Company holds a valid and subsisting perpetual and irrevocable grant from the State of Mississippi

Here, stating:

> "There is essentially only one question involved in this case, to-wit whether or not Chapter 38 of the Mississippi Laws of 1886 constituted an offer by the State of Mississippi which, when accepted, resulted in a contract between the State and the telephone companies accepting the offer which cannot be impaired by subsequent legislation, and whether or not appellee is entitled to succeed to any right under said Chapter 38."

appellant assigns a single error, that the district judge erred in granting plaintiff the declaratory judgment as prayed and in denying the defendant's counter claim for a decree requiring appellant to discover the amount of its monthly service charges and to pay appellant two percent of the total of such charges. Beginning its argument with the statement:

> "All of the facts in this case are stipulated and there is no dispute about such facts, although there

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for the use and occupancy of all the highways, streets, and roads of Mississippi, including municipal streets, without paying compensation therefor.

"3. That Chapter 372, Mississippi Laws of 1956, is beyond the power of the Legislature of the State of Mississippi and in conflict with the Constitution of the State of Mississippi and the Constitution of the United States, if it be construed as applicable to or undertaking to authorize a municipality to impose a charge upon Southern Bell Telephone and Telegraph Company for the continued and future use of municipal streets.

"4. All costs in this cause having been paid or provided for, no provision therefor is made in this order.

"ORDERED and ADJUDGED this 14th day of Sept., 1957."

> may be differences of opinion as to the inferences to be drawn therefrom. The stipulated facts consist largely of a history of the telephone companies within the State of Mississippi from the establishment in this state to date, insofar as such history is now available."

and setting out the history in its brief, appellant, discussing under seven numbered points, each extensively argued, the claimed errors of the district judge and assailing his opinion and order as without support in fact and in law, thus concludes its lengthy and detailed brief:

> "We submit that the history of the enactment of Chapter 38 of the Mississippi Laws of 1886 definitely rules out any idea that the legislature of Mississippi intended by that chapter to offer the grant of an irrevocable, perpetual franchise to telephone companies taking advantage of the act. We submit further that this history shows without any equivocation that the purpose of that act was simply to reenact legislation giving telegraph companies the right of eminent domain. That in the course of the passage of that act through the legislature telephone companies were included in the act so that they also would have the right of eminent domain. The fact that the appellee has been unable to present one shred of evidence to show that any claim was ever made to such a statewide franchise prior to 1929—although there were two litigated cases involving such rights—indicates clearly that appellee's predecessors in title did not interpret this law as giving them such a statewide franchise. We

submit further that, if such a franchise were intended, their right to claim such a franchise, has now been lost by the actions of appellee's predecessors in title. The facts in this case distinguish it from all of the reported cases holding that particular legislation was the offer of an irrevocable perpetual franchise.

"The effect of the decision of the learned district judge is not limited to the City of Meridian. It involves the birthright of all citizens of the State of Mississippi and of untold future generations. We earnestly urge the court to study carefully the history of this legislation and the actions of the parties thereunder. We sincerely believe that if that is done, the court will arrive at the same conclusion to which we have arrived—that no such irrevocable, perpetual franchise ever existed, and that, even if it did, it has been long ago lost by the actions of appellee's predecessors in title. Therefore, the judgment of the district court should be reversed, the complaint of appellee dismissed with prejudice and judgment awarded appellant on its counter claim."

Appellee, on its part, agreeing with appellant that there is no issue of fact in this case, and stating:

"Before taking up our particular reply to appellant's brief, we believe that it will clarify the issue for us to present the contentions which were submitted to and sustained by the court below."

puts forward as a basis for them, Point One of its own:

"The Mississippi Act of 1886, contained an offer which, when accepted by the plaintiff, resulted in a contract between the State and the plaintiff which cannot be impaired by subsequent legislation."

In general support of this point and of its contention that the opinion and decision of the district judge were correct and should be affirmed, appellee thus states and argues its position:

"It is our position that the offer contained in the act of 1886 was accepted by the plaintiff's predecessors, and that when that offer was accepted it resulted in a contract which cannot be impaired by the imposition of additional burdens such as the exaction of compensation.

"It is admitted in the answer and stipulated in the record that both the Great Southern Telephone and Telegraph Company and the Cumberland Telephone and Telegraph Company were operating in the State of Mississippi prior to 1886, and during each and every year since 1886, those two companies and Southern Bell have continued to construct, maintain, operate and expand and extend their plant and facilities throughout the state.

"The following propositions of law, which were sustained by the lower court, have been firmly established by judicial decisions of the United States Supreme Court, other federal courts, and state courts:

"(1) The Legislature of Mississippi in 1886 had plenary control over all highways and streets of

the state, whether within or without municipalities, and the Act of 1886 was an offer to telephone and telegraph companies of the right to make use of all such highways and streets for the purpose of providing the citizens of this state with telephone service. This right was granted without any requirement of paying compensation to either municipalities or the state. The companies were already operating in the state, obviously on a small scale—the industry was in its infancy—the legislature wanted the industry to expand—note the title to the Act, page 8, supra.

"(2) That the continued maintenance of poles and lines and other facilities after 1886, as well as the continued construction, expansion, and extension of such lines on the public streets of Meridian and other streets and highways throughout the State of Mississippi constituted an acceptance by the telephone company and its predecessors of the offer of the right to use all streets and highways which was contained in the 1886 Act.

"(3) That these acts of acceptance resulted in the creation of a perpetual and irrevocable contract between the Telephone Company, on the one hand, and the State of Mississippi, on the other, which contract right is protected from impairment by the provisions contained in both the Federal and State Constitutions prohibiting the impairment of the obligation of contracts.

"(4) The imposition upon appellee of an obligation to pay two percent of its monthly service charg-

es as compensation for the use of the streets of Meridian constitutes an unlawful attempt to violate the obligations of a contract which was created and has been in existence for more than seventy years, and is therefore violative of the constitutional prohibitions. It would place an additional burden on the vested rights of the plaintiff.

"The various arguments advanced by appellant in its brief were argued at great length to the district court. The court, after giving consideration to all these contentions, and after reviewing the circumstances and conditions which existed at the time of the passage of the 1886 Act, concluded that the Act extended an invitation in a contract which is protected not only by the Federal Constitution but by the State Constitution of Mississippi as well."

Upon a careful examination of the briefs and arguments in the light of the record made below, we find that they present nothing for our consideration that was not presented to, and considered by, the district judge, with whose judgment and with the reasons given for it in his thoughtful and thorough opinion, we find ourselves in full agreement. We conclude, therefore, that no useful purpose would be served by our rediscussing at length all the contentions of the parties and redeclaring as to them the views declared by him. In addition to announcing our general agreement with the opinion and the result, it will, we think, be sufficient for us to write briefly on one or two of the contentions made and strongly relied on by appellant as to which we think something in addition may well be said.

Of these contentions, the one most strongly urged by appellant is that, since in the Hodges opinion, 18 So. at page 84, the court stated of the Act of 1886:

> "It is a permissive statute. What it grants is a mere license revocable by the state. 148 U. S. 102."

this constitutes a binding decision against the conclusion of the district judge that the statute constituted, beyond the power of the state to impair, an offer which, when accepted, became a binding contract. In our view this contention is without merit because, considered in itself, the language above quoted is dicta, stated merely arguendo and as a make weight and not in decision of any point at issue in the case. More important, however, if the statement could be considered decisional, that in short, though the issue was not raised in the case the court was intending to and did decide that rights conferred by the statute of 1886 upon those accepting under it could be taken away or impaired by subsequent legislation, appellant can take no comfort from such a decision. For, under the federal decisions cited and relied on by the court below, the offer of the statute when accepted became a contract beyond the reach of state impairment by either legislative or judicial action, and any decision of the Mississippi Supreme Court must yield to the decisions of the Supreme Court of the United States to the contrary. Though, as clearly pointed out in the brief of appellee, a different Mississippi statute and a different Mississippi constitution are involved in *Willmutt Gas & Oil Co. v Covington County*, 71 So(2) 184, and there are other reasons for distinguishing the decision in that case, the same general considerations which deprive the Hodges case of authority here deprive that case of

authority. There the court held that, while the county could not prevent the use of the 16th Section lands there involved, it could under the particular language of the act, construed in the light of the Mississippi Constitution of 1890, make a charge for such use. While there was a dissent in the case as to the proper construction of the act, no constitutional question, no claim of impairment of a contract was raised, either by the parties or by the court.

Another matter of which brief notice may be taken is the complete inapplicability to the point presented and decided here, whether a later state act can impair the obligation of a contract entered into with the state, of the opinion of the Sixth Circuit in *Memphis v. Postal Telegraph & Cable Co.*, 145 Fed 602. What and all that was held in that case was that the State of Tennessee, which by an earlier statute had expressly granted to the City of Memphis the right to charge a rental for the use of its streets, had not by the enactment of a later general statute granting telephone and telegraph companies the right to use the streets, impliedly repealed the right so granted. In it the court merely held that the later statute was not intended to and did not repeal the earlier one on the facts of this case. No question of that kind is or could be presented here. There the utility was endeavoring to have the earlier statute declared repealed by the later, while here all that the utility is seeking is to have the later statute, as it was in the Memphis case, held to have been enacted with due regard and subject to the earlier one. What is said arguendo in the final paragraph of the opinion as a whole and, so read, is entirely consistent with this view.

Other specific contentions and arguments of appellant,

no better founded than these, could be pointed to. It will suffice, however, we think, to say that, confining our opinion, as the district judge did below, to the sole question presented in this case, whether the Mississippi Act of 1956, in attempting to authorize the City of Meridian to exact compensation by imposing a rental charge for the use of the streets for the poles, wires and other equipment of the plaintiff was invalid as impairing the obligation of a contract and may not therefore be enforced against the appellee, we approve his opinion and judgment. Nothing in the opinion below dealt with, nothing in what we do here in affirming it undertakes to deal with or decide, any question beyond the specific question here presented. Particularly is it not intended to deal in any way here with questions relating to the exercise of the taxing and police powers of the state or city.

As thus specifically limited, the opinion of the district judge is approved and his judgment is AFFIRMED.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI,
EASTERN DIVISION

SOUTHERN BELL TELEPHONE AND
TELEGRAPH COMPANY,
PLAINTIFF

VS. NO. 812

CITY OF MERIDIAN, MISSISSIPPI
DEFENDANT

OPINION OF THE COURT
(Filed Sept. 6, 1957)

This is an action for declaratory judgment brought by the Southern Bell Telephone & Telegraph Company against the City of Meridian, Mississippi. The principle question for solution is whether or not an irrevocable franchise was granted to the predecessors of Southern Bell Telephone & Telegraph Company by an act of the legislature of the State of Mississippi in 1886, and whether or not the telephone company accepted that grant so as to constitute a contract protected by the Federal Constitution.

The question stems and arises by virtue of the passage of an act of the Legislature of Mississippi in 1956, under which statute the City of Meridian contends it is authorized to charge the telephone company two per cent of the company's monthly service charges as compensation for use of the streets, alleys and public places situated in the City.

The plaintiff contends that it holds a perpetual and irrevocable grant from the State of Mississippi to the use and occupancy of all the highways, streets and roads in

Mississippi, including municipal streets, without paying compensation therefor, and that this right was granted to the company and its predecessors by the act of the Legislature of 1886. The plaintiff further contends that the act of 1956, Section 5 (e) thereof, does not authorize the charge claimed by the City.

The City contends that no perpetual grant was given by the act of 1886, but that it was only a license and subject to be extinguished by an act of the legislature at any time it desired. It further contends that even if the law of 1886 was an irrevocable grant, then the defendant has rescinded and abandoned the grant by the action of the plaintiff's predecessors in title by entering into new contracts with the defendant and other municipalities in the State of Mississippi inconsistent with the alleged agreement made under the Laws of 1886; and further by the acceptance of benefits and advantages under the Mississippi Constitution of 1890 by the plaintiff and its predecessors in title and thereby agreeing by virtue of Section 179 of the Mississippi Constitution of 1890 to the relinquishment of all contractual rights held by the plaintiff and its predecessors in title contrary to the said constitution of 1890. It further contends that plaintiff's predecessors in title had abandoned all rights acquired under the act of 1886 and that as a matter of fact the City had reacquired all of the alleged rights by prescription or adverse possession and that the plaintiff had lost the alleged rights by reason of estoppel and laches.

Briefly, those are the contentions of the respective parties.

In determining the intent of the legislature by its act of 1886 it is necessary to consider the act as of the time when it was passed. Prior to 1886 the State of Mississippi had

conferred upon telegraph companies the right to erect their posts and fixtures upon the highways and streets of the State, but telephone companies by the prior acts were not mentioned. See Section 1065, 1066 and 1067 of the Miss. Code of 1880. In 1886 the legislature adopted Chapter 38, granting to telegraph and telephone companies the right to use the streets and highways for the purpose of broadening the communications system, and by the title of the act it is shown it was passed for the purpose of encouraging and facilitating the construction of telephone and other like lines in the State. The pertinent part of the act is as follows:

> "AN ACT to encourage and facilitate the construction of Telegraph, Telephone and other like lines in the State of Mississippi.
>
> SECTION 1. Be it enacted by the Legislature of the State of Mississippi, that any telegraph or telephone company, chartered or incorporated by the laws of this or any other State of the United States, shall, upon making due compensation, as hereinafter provided, have the right to construct, maintain and operate telegraph or telephone lines through any public lands of this State, and on, across and along all highways, streets and roads, and across and under any navigable waters, and on, along upon the right of way and structures of any railroad, and, in case of necessity, on, under, or over any private lands in this State; provided, that the posts, arms, insulators and other fixtures of such telegraph or telephone lines be so erected, placed and maintained as not to obstruct or interfere with

the ordinary use of such highways, railroad, streets or water, or with the convenience of any land owner, more than may be unavoidable."

The pertinent parts of Chapter 372, Laws of 1956, are as follows:

"In addition to such other rights as it may have to use the streets, alleys and public places of a municipality, a public utility which holds a certificate of public convenience and necessity granted under the provisions of this act covering the geographical area of such municipality, and which (1) is operating under a municipal franchise on the effective date of this act, or (2) shall have previously operated under such a municipal franchise which has expired within five (5) years prior to the effective date of this act, or (3) which shall hereafter operate under a municipal franchise hereafter granted, may, after the expiration of any such franchise continue to use the streets, alleys and public places therein situated upon condition that (1) such utility shall pay the said municipality compensation therefor at the rate of two per cent (2%) of said utility's gross revenues from sales to residential and commercial customers within said municipality, in case of a utility defined in Section 1 D (1) and 1 D (2) and in the case of a utility defined in 1 D (3) the said utility shall pay two per cent (2%) of the monthly service charges in said municipality whether said utility has a franchise to operate therein or not, such payments to be made quarterly of each year after the effective date of this act, and

(2) that after the expiration of such franchise the municipality, or any customer of such utility in such municipality, upon appropriate petition, shall be entitled to a hearing as to whether or not the certificate of convenience and necessity may then and thereafter be granted on a permanent basis as herein set out. Any co-operative which shall operate within any area of a municipality shall likewise pay such municipality two per cent (2%) of the co-operative's gross revenue from sales to residential and commercial customers within said municipality. Any municipality shall have the right to acquire by purchase, negotiation or condemnation the facilities of any utility that is now or may hereafter be located within the corporate limits of such municipality."

Another pertinent part of the Laws of 1956, being Section 39 of Chapter 372, is as follows:

"Repeal of conflicting acts. —Any acts, or parts of acts, in conflict with the provisions of this act are hereby repealed, but neither the repeal of any such acts nor the passage of this act shall affect any act done, or any cause of action, whether in litigation or otherwise, or any rights accruing, accrued or established prior to the effective date of this act."

The is no controversy about the facts in this case. All the facts are stipulated or shown by documentary evidence in the record from which inferences may be drawn. Prior to 1850 the telegraph came into public use and shortly thereafter the Legislature of Mississippi enacted a statute au-

thorizing telegraph companies to construct their lines and to set up and erect poles and fixtures along the public highways and streets of the State of Mississippi, as well as through public lands belonging to the State. (See Miss. Code 1857, p. 300) Following the invention of the telephone in 1876 several companies entered Mississippi and began operation of a telephone business. Prior to August 4, 1883, the Louisiana Telephone Company maintained telephone exchanges and used the streets, alleys and public places in certain municipalities, including the City of Meridian. On August 4, 1883, the Louisiana Telephone Company conveyed to the Great Southern Telephone and Telegraph Company all of its properties and rights. Subsequent to this purchase and during each year subsequent to the enactment of Chapter 38 of the Mississippi Laws of 1886, and up until the year 1898, when it was consolidated with the Cumberland Telephone and Telegraph Company, the Great Southern Telephone and Telegraph Company operated under this statute and used the streets and roads in the State to promote its business. The Cumberland Telephone and Telegraph Company had started to do business in Mississippi prior to the year 1886, and after the passage of the Laws of 1886 and during the subsequent years until 1926, the Cumberland Telephone and Telegraph Company continued to expand its business and to use the highways and streets in the State. On June 30, 1926, the Southern Bell Telephone & Telegraph Company purchased the Cumberland Telephone and Telegraph Company and succeeded to all the rights and property of the Cumberland Telephone and Telegraph Company of every kind. Since the acquisition by the Southern Bell Telephone and Telegraph Company it has continued to expand its business and to use the streets and highways in the State of Mississippi, and it therefore

appears that the plaintiff and its predecessors in title have continuously used the roads and public streets in the State of Mississippi from 1884 up until the present time and up until the time of passage on March 29, 1956 of the act of the legislature under which the City of Meridian now contends it is entitled to charge the two per cent of plaintiff's monthly service charges.

As hereinbefore stated, some of the telephone companies had begun to do business in the State and the City of Meridian was one wherein it was doing business, and the City of Meridian had given the telephone companies the right to use the highways and streets free of charge, as had also the cities of Jackson and Vicksburg; but the City of Jackson had granted such right upon the consideration that the telephone company would furnish them one telephone free of charge. Since that time the City of Meridian has granted franchises to the telephone companies and the telephone companies have furnished a small number of telephones to the City free of any charge whatsoever.

One of the early decisions of the Supreme Court of Mississippi applicable to the issues in this case is that of Hodges vs. Western Union Telegraph Company, 72 Miss. 910, 18 So. 84. In that case the City had passed an ordinance requiring all the telegraph companies doing business in the city to pay as rent for the use of the streets $2.50 per year for each telegraph pole erected on any of the streets. The company declined to pay the rent and suit was filed to collect the rental charge. The Supreme Court of Mississippi held that under the act of 1886 the Western Union had the right to occupy the streets of the city without compensation and that all the power which the city had over its streets

was derived from the legislature, whose power over the streets of the city was supreme and transcendent, and that the Act of 1886 required no compensation to be paid by the company for the use of the streets. The court further held in that case that the legislature, not having authorized the City of Meridian to exact a rental charge, that its effort so to do was beyond its power. It further held that the act was a license to the company to use the streets, but was revocable at the will of the legislature.

The question now arises whether or not the plaintiff in this case and its predecessors in title had accepted the privileges granted by the Laws of 1886 so as to constitute a contract between the State and the companies that is protected by the federal and state constitutions. The authorities are unanimous that it is a binding contract and to change its terms would be to impair the obligations of a contract and conflict with the U. S. Constitution. Certainly if the act had been repealed before it was accepted by any company, then no company coming into the State subsequent to the repeal could claim its benefits; but the plaintiff in this case, having accepted the benefits and relied upon its provisions and expanded its services, indicated a clear intent to accept the offer, and as a result a binding contract became effective. This question has been before the Supreme Court of the United States, as well as many of the states, and all the courts hold that where there has been an offer and an acceptance by conduct, then a binding contract is created and the offer to the state to companies of benefits when accepted by any utility is irrevocable and is more than mere license to use the streets at the will of the legislature. Many authorities are cited by plaintiff upholding this doctrine and no one squarely in point is cited

by opposing counsel, but counsel for the City do cite many authorities upon a different state of facts. I shall not undertake to cite all the applicable authorities but only those that are clearly decisive.

The Supreme Court of the United States in Russell vs. Sebastian, 233 U. S. 195, that under an act of California offering the use of the streets to a gas company and accepted by the gas company by the use thereof, created a contract and that to change its terms would be to impair the obligagations of the contract. In that case there was a grant to utilities contained in the California constitution of 1879. The gas company entered the city in 1909 and laid its pipes in certain streets of the city. In 1911 the California constitution was amended and the city contended that the 1911 amendment to the state constitution took away the grant contained in the constitution of 1879. When the Gas company continued to use the streets and to expand into new streets the city undertook to adopt an ordinance prohibiting the laying of pipes without a grant from the city and unless the utility company bought and paid for a municipal franchise. The city in that case further contended that the grant of the state, if it had been a contract, should not extend to any streets other than those that were being occupied prior to 1911. The California Supreme Court upheld the contention of the city, but the Supreme Court of the United States rejected the city's contention and held that the offer of the state when accepted by the utility ripened into a contract which was protected under the constitution. In that case the court said: "That the grant, resulting from an acceptance of the state's offer, constituted a contract, and vested in the accepting individual or corporation a property right, protected by the Federal Constitution, is not op-

en to dispute in view of the repeated decisions of this court."

The court further said:

"The controversy in the present case relates to the extent to which the grant had become effective through acceptance. It is not contended that the change in the constitution could disturb the company's rights in the streets used previous to the amendment; but it is insisted that such actual user measured the range of the acceptance of the grant, and hence defined the limits of its operation***."

"***Such a grant would not be one of several distinct and separate franchises. When accepted and acted upon it would become binding—not foot by foot, as pipes were laid, but as an entirety, in accordance with its purpose and express language." See also Grand Trunk Western R. Co. vs. South Bend, 227 U. S. 544; also a later California case, Pacific Telephone and Telegraph Company vs. City of Los Angeles, 282 Pacific 2d, 36; Owensboro vs. Cumberland Telephone and Telegraph Company, 230 U. S. 58, in which case the court said: "That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such company is the granting of a property right has been too many times decided by this court to need more than a reference to some of the later cases***

"The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself, or as a consequence of some

limitation imposed by the general law of the state, or by the corporate powers of the city making the grant." See also City of Louisville vs. Cumberland Telephone & Telegraph Company, 224, U. S., 649.

In 1953 the Attorney General of the State of Mississippi was requested to give an opinion as to whether in granting a franchise to the Southern Bell Telephone & Telegraph Company a municipality may exact from the company as the consideration for the franchise the certain percentage of the company's gross income. The Attorney General's opinion shows that he gave an extensive investigation into the question and answered that in view of the Laws of 1886 he was of the opinion that there was a contract created by the act of 1886 and the acceptance of the use of the streets by the telephone companies, and that, therefore, to exact compensation would be in violation of the Federal Constitution. This opinion, of course, is not binding upon the courts, but is a persuasive authority. See also Southern Bell Telephone and Telegraph Company vs. City of Mobile, 162 Federal 523; 174 Federal 1020 (Fifth Circuit Court of Appeals case.)

Under the stipulation and documents offered in evidence it is clear that the act of 1956 by the Mississippi State Legislature, if it undertakes to authorize a municipality to impose the charges, is beyond the power of the legislature and would conflict with the constitution of the United States.

The City contends, however, that even though there was created a contract that by the subsequent conduct of the plaintiff and its predecessors it has abandoned that contract and estopped itself to claim any rights under the

contract by its subsequent conduct; that by entering into a new contract with the defendant and by taking advantage of laws passed under the Mississippi Constitution of 1890 it relinquished any rights that it had under the act of 1886, and that the City had extinguished the grant by prescription or adverse possession and that the plaintiff was guilty of such laches that it could not now take advantage of the act of 1886. One of the acts that the City relies upon is that on April 7, 1898, it appeared before the Mayor and Board of Aldermen of the City of Meridian and sought a franchise from the City to use the streets in the operation of its telephone business, and that in 1898 the City of Meridian filed a suit against the Cumberland Telephone Company in which it sought an injunction against the company to prevent it from using the streets without a franchise from the City. This case was removed to the Federal Court of the Southern District of Mississippi, but the record has now been lost and the only thing shown is the judgment of the Federal Court wherein the lawsuit was dismissed at the cost of the City. After dismissal of the lawsuit in the Federal Court the attorney for the telephone company appeared before the Board of Aldermen on June 9, 1899, seeking a franchise for the said company in order that the company might establish their plant and do business in Meridian. Subsequently a franchise was granted and in granting that franchise the company agreed to furnish to the City free of charge some few telephones. Also relied upon by the City is the conduct of the company in taking advantage of a general law of the State by which telephone companies were given the right of eminent domain over private property. With reference to the franchises, the record shows that on May 6, 1884, the governing authorities of the City of Meridian authorized a predecessor of plaintiff to operate telephone

lines in the City of Meridian and to use its streets and other public places for such service, and that by March 16, 1886, the date of the passage of the act, one of plaintiff's predecessors in title had established a telephone exchange in the City of Meridian and was operating forty-four telephones in the homes and offices in the City. And, likewise, prior to March 16, 1886, the Cumberland Company, another of plaintiff's predecessors, had commenced operations in the State of Mississippi, and that between March 16, 1886, and March 8, 1898, two of plaintiff's predecessors had secured franchises in seven cities in Mississippi and had accepted the franchises and had agreed to furnish free telephone service to the cities.

The fact that prior to 1886 franchises had been granted by the cities, and even though consideration might have been paid therefor, is immaterial for the reason that under the Hodges case, cited supra, the State Legislature had complete control over all of the streets and highways of the State, and, therefore, when the act of 1886 was passed it took away from the cities the power to make any charge for the use of the streets by telephone companies. The company is not estopped by the act of its predecessors or either by entering into new franchises for the reason that there was already existing an irrevocable contract between the State and the plaintiff and its predecessors granting to the plaintiff the right to use the streets. This right could not be altered. The furnishing of a few telephones free of charge to the City would be insufficient on which to base a judgment that the telephone company, and its predecessors, had abandoned any such valuable right as it had under the grant. There is no inconsistency in operating under the grant that is given to it by the State and any grant that it might

receive from the municipality. Traverse City vs. Consumers Power Company, 64 N. W. 2d, 894; Northwestern Telephone Exchange vs. City of Minneapolis, 83 N. W. 527; and in the later opinion in 86 N. W. 69; City of Los Angeles vs. Los Angeles Water Company, 177 U. S. 558; City of Minneapolis vs. Minneapolis Street Railway Co. 215 U. S. 417, wherein the Supreme Court of the United States said, "Acquiescence in a regulation which may not have been deemed injurious and may have been deemed wise and expedient does not preclude a contest against the enforcement of regulations which are injurious and violative of contract rights."

The contention that the plaintiff is estopped by accepting benefits under the constitution of Section 179 of 1890 cannot be upheld. When the constitution was adopted in 1890 the plaintiff had acquired vested rights and these vested rights could not be impaired by the State of Mississippi either by legislation or by the adoption of a constitution undertaking to do so. Russell vs. Sebastian, 233 U. S. 195, and other authorities hereinbefore cited. In 1890 plaintiff's predecessors were already doing business in the State and had acquired vested property rights that were irrevocable, and nothing but a clear intent to abandon those property rights or to relinquish them could deprive plaintiff or its predecessors of those rights. Plaintiff and its predecessors had a perfect right to take advantage of any general laws that were passed for the benefit of it or any other corporations engaged in business in the State, and the fact that it does do so cannot deprive it of a vested right. As a matter of fact, the history of Sections 178 and 179 as gleaned from the decisions of the Supreme Court of Mississippi indicate very clearly that Sections 179 was not intended to apply to foreign corporations, but was applicable only to the

corporation created under the laws of the State of Mississippi. It is clear, however, under the authorities that if it was intended to apply to foreign corporations, then it could not be applicable to the plaintiff and its predecessors because of their rights having become vested prior to 1890. An intent to relinquish a vested right must be very clear, and certainly there is nothing in this record that shows any intent on the part of the plaintiff or its predecessors to relinquish any right it had therefore acquired. The doctrine of laches, estoppel or adverse possession is not applicable to the facts disclosed by the record in this case. The plaintiff nor any of its predecessors has been guilty of any conduct that would estop it from asserting the rights it now claims. It is guilty of no laches for the reason that the record shows clearly that from 1886 up until the present date it has continuously and uninterruptedly used the streets and highways of the State under the grant given by the act of 1886, and up until the passage of the act of the Legislature of 1956 its right to use the streets of the cities and the highways of the State has not been challenged successfully in any proceeding whatsoever.

I am of the opinion that the City is without power to impose the charge it seeks to impose upon the plaintiff in this case and that a declaratory judgment should be entered denying the City of Meridian the right to impose the charge.

An order may be drawn accordingly.

CHAPTER 38 OF THE MISSISSIPPI LAWS OF 1886 READS IN FULL AS FOLLOWS:

AN ACT to encourage and facilitate the construction of Telegraph, Telephone and other like lines in the State of Mississippi.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That any telegraph or telephone company, chartered or incorporated by the laws of this or any other State of the United States, shall, upon making due compensation, as hereinafter provided, have the right to construct, maintain and operate telegraph or telephone lines through any public lands of this State, and on, across and along all highways, streets and roads, and across and under any navigable waters, and on, along upon the right of way and structures of any railroad, and, in case of necessity, on, under, or over any private lands in this State; provided, that the posts, arms, insulators and other fixtures of such telegraph or telephone lines be so erected, placed and maintained as not to obstruct or interfere with the ordinary use of such highways, railroads, streets or water, or with the convenience of any land owner, more than may be unavoidable.

Right to contract over private lines, etc.

Over private lands, etc.

SEC. 2. *Be it further enacted*, That whenever any such telegraph or telephone company desires to construct its lines on, along or

upon the right of way and structures of any railroad, or upon and along the roadway of any incorporated turn-pike, or in case it should be necessary to construct the same under, on, or over any private land in this State, the said telegraph or telephone company shall, by its agents, have the right peaceably to enter upon and survey, locate and lay out its said lines thereon, and may contract with the owner or owners of any such railroad for the use of its right of way and structures, or with any turnpike company for the use of its right of way, for telegraph or telephone purposes, and may agree and contract with the owner of any land for an easement therein, for the purpose of constructing, maintaining and operating its lines, as herein provided; and in case said lands belonging to the estate of any deceased person, then said company may agree and contract with the executor or administrators thereof, and if the same belongs to a person *non compos mentis* or a minor, then with the guardian, or in case said land be held by trustees of school sections, or any other trustees, then with such trustees, said executors, administrators, guardians and trustees being hereby declared competent to make such contracts, which shall be binding upon all parties in interest; and said executors, administrators and guardians shall be liable on their respective bonds, to those interested for any money received by them un-

May contract with owners for easement.

With whom to negotiate.

der said contracts or agreements; and, if the parties and such company prefer the question of such compensation shall be referred to arbitrators, mutually chosen, whose award, or in case of disagreement, that of the umpire shall be binding between the parties.

Arbitrators may be chosen.

SEC. 3. *Be it further enacted*, That in case any telegraph or telephone company having the rights and privileges, herein granted, for any cause, shall not agree with the owner or owners of any land, or with the executor, administrator, guardian or trustees of the estate to which the same belongs, or with the owners, lessees or managers of any railroad or incorporated turnpikes, on or in which an easement, right or privilege is sought, such telegraph or telephone company may file its petition in the office of the clerk of the Circuit Court in the county in which said land is located, or in case of a railroad or turnpike, then in the office of the Circuit Clerk of any county in which any portion of the said railroad or turnpike may be located, or through which the same may run. Said petition shall designate the land or railroad and structures or turnpikes as the case may be, and particular use, right, easement or privilege sought to be condemned. It shall also give the name of the petitioner, and shall give the place of residence, if the same be known, of the name or names of the reputed owner or owners of said property, or of the executor, administra-

In case shall not agree.

May file petition.

Petition to designate land, etc.

Signed and sworn to.

tor, guardian or trustees, and if the name and places of residence of such persons be not known to the petitioner, the petition shall so state; such petition shall be signed and sworn to by an officer, agent or attorney of the telegraph or telephone company.

SEC. 4. *Be it further enacted*, That such petition as herein before provided for may be filed at any time, and the proceedings thereunder had shall be *in rem* against such parcel or parcels of land, or against such railroad and structures or turnpike roadway, such petition and proceedings in case the lands of private owners are proceeded against, shall only embrace or include in any one proceeding the lands of one proprietor or owner, in case any right, privilege or easement is claimed or demanded in or along any railroad right of way and structures or in or along any turnpike, then the property of but one such railroad or turnpike can be embraced in one petition.

May be filed at an ytime.

SEC. 5. *Be it further enacted*, That it shall be the duty of the Clerk, upon the filing of such petition, to cause a notice in general terms thereof, and of the time appointed for the inquest, to be served upon the owner or owners of said lands, guardians, executors or administrators or trustees, as hereinfore provided, to be left at his or her, or their place, or places of residence, at least five days be-

Clerk to give notice.

fore such assessment, if such parties named in said petition reside in the county; and in case of a railroad or turnpike, the notice may be served upon any agent upon whom notice of any legal proceedings is hereby authorized to be served; if any such owner, or their places of residence are not known or stated in the petition, or if such owners or any of them reside out of the county, such notice shall be published by three consecutive weekly insertions in any newspaper published in the county in which such petition is filed, and if none be published in the county, then in some newspaper published in one of the cities or towns of Mississippi which shall be nearest said property, and a copy of such notice shall be mailed to such interested party by the said Clerk.

Publication to be made.

SEC. 6. *Be it further enacted,* That upon the filing of any such petition, the Clerk shall forthwith issue a writ commanding the Sheriff to summon and to have in the office of said Clerk, or on or near said land, railroad or turnpike, at the time in the writ to be mentioned, and within ten days, in case the proceeding is against a railroad or turnpike company, or if the owners all reside in the county, and are known, or, if not, then within thirty days, nine good and lawful men, citizens of the county, from whom, and talismen, if need be, five Commissioners shall be cho-

Writ to be issued.

Five commissioners.

sen, who shall be sworn by the Sheriff, or his deputy, to well inquire and true assessment make, of the due compensation for the cash value and actual damage which the owner or owners of said land, railroad or turnpike company respectively, shall be entitled to have for the appropriation thereof, to the use of the petitioner, as prayed for, and a majority of said Commissioners, may render said award; the said Commissioners may hear testimony of witnesses offered by either party, who shall be sworn by the Clerk, as to the cash value of the land sought to be appropriated by the petitioner, and the injury then necessarily known to result to such owner, railroad or turnpike company, as the necessary and immediate consequence of the appropriation sought to be made by the petitioner, without reference to uncertain or remote benefits or disadvantages that may or may not occur in the future; the Clerk shall take down the testimony in writing, and the Sheriff or his deputy shall preserve order.

To hear testimony.

Testimony in writing.

SEC. 7. *Be it further enacted,* That the said Commissioners may, if they so desire, inspect the road, structure or land on which an assessment or privilege is sought, and the owners of any land, railroad or turnpike may intervene for their respective interests in the premises, and may have the writ of subpoena issued by the Clerk and executed by the

Commissioners may inspect land.

Sheriff, for any witnesses, but no evidence shall be received in respect to the title or ownership of the property, nor upon any question other than that of the cash value of lands sought to be appropriated by the telegraph or telephone company, and the injuries then necessarily known to result to such owner, railroad or turnpike company, as the necessary and immediate consequence of the appropriation sought.

May sit from day to day.

SEC. 8. *Be it further enacted*, That if said Commission shall fail to complete its inquiries and make an award the first day assembled, the Sheriff shall adjourn said Commission over from day to day, until the same is completed, and, in the event any of said Commissioners shall, after having been sworn, and before the rendition of the award, become unable from sickness or other cause, to continue on said Commission, he may be excused therefrom by the Sheriff, and another summoned in his place, who shall be sworn as the others were, and to whom shall be read the testimony of the witnesses who have before that testified in the case, and who shall act in lieu of the Commissioner so excused.

Report of award to be delivered to sheriff.

SEC. 9. *Be it further enacted*, That the Commissioners, after making their award as hereinbefore provided, shall make and sign a report of their proceedings in the premises,

and shall deliver the same to the sheriff, who, for any informality, may have the same corrected by said Commissioners, and said sheriff shall make immediate return thereof, with the writ, and his actions thereon, to the said clerk; and, upon the actual payment in cash, or tender of the same, to the person or company, or the said clerk for the use of the same, entitled to receive the same of the whole amount of the award made as hereinbefore directed, the said petitioner or its assigns, shall have the full and perfect right to enter upon the property described in said petition, and to have, possess and enjoy the easements, rights and privileges the petition set forth and claimed; and a full record shall be kept in said clerk's office, of all proceedings had under this Act.

Record to be kept.

SEC. 10. *Be it further enacted*, That for good cause shown by the petitioner, or any owner, railroad or turnpike company, by motion to the judge of the circuit court district in which said proceedings were had, a new inquest and assessment may be had; *provided*, said motion shall state the grounds upon which said new inquest is asked, and be supported by the affidavit of the party applying therefor; that the award of the Commissioners was contrary to the law and the evidence, and shall have filed therewith a certified copy of all the proceedings had and done on the

For good cause new assessment may be had.

premises, including a copy of all the evidence, of the hearing of which motion the opposite party shall have at least five days' notice; and said motion must be made within ten days after the rendition of the award, as above provided for, and not after; and, if upon a consideration of the matter, the Judge shall be of the opinion that the Commissioners acted upon testimony that was irrelevent or incompetent, and that their award was contrary to the law, and such evidence as was competent and relevant, and that injustice has been done, a new inquest and assessment shall be ordered by him; and he shall order a new writ to issue and another inquest and assessment to be had, as on the first, at a day to be named by him, not less than five nor more than fifteen, after such order; *provided further*, that not more than one new inquest and assessment shall be allowed at the same matter; and, *provided further*, that from all orders of said Judge in reference to any proceedings under this Act, an appeal may be taken to the Supreme Court of this State within thirty days from the making of any such order or from the final order therein made, the appellant being required to give security for the cost of the appeal as in other cases; but no appeal shall hinder or delay a petitioner who has paid or tendered, to the party or parties, entitled under the award to receive the same, the amount of the award, from constructing and operating their lines on or over said prop-

Motion within ten days.

Only on new assessment allowed.

Appeal within thirty days

erty.

SEC. 11. *Be it further enacted,* That the Sheriff may act by his regular sworn deputy, or the coroner may act as in other cases provided by law; and for any default of the clerk, sheriff, coroner, commissioner, witnesses, or other persons, the penalty prescribed by law for like default in cases pending in the circuit court shall be enforced.

Who may act

SEC. 12. *Be it further enacted,* That the fees to be allowed in proceedings, under this Act, shall be as follows: To the clerk, for the filing of each petition, fifty cents; for the issue of each writ or notice, twenty-five cents; for each copy thereof, when executed, fifteen cents; for each subpoena, fifty cents; for filing the report of the commissioners and return of the sheriff, fifty cents; for filing any other paper or motion, ten cents; for issuing any other notice, twenty-five cents; for final record, advertising the same as allowed by law in other cases, and for taking down the testimony, he shall be allowed five dollars per day; to the sheriff, for serving notice each, fifty cents, summoning and organizing the Commissioners, three dollars; for presiding at the inquest and assessment for each day actually employed, three dollars; returning writ and report of Commissioners, one dollar, and to the commissioners, each three dollars per day, for each day actually employed.

Fees to be allowed different officers.

SEC. 13. *Be it further enacted,* That at the

Security for costs.

time of filing of said petition, such telegraph or telephone company may be required to give security for the cost of the proceedings.

SEC. 14. *Be it further enacted,* That all laws and parts of laws in conflict with this Act are hereby repealed, and that this Act take effect and be in force from and after its passage.

Approved, March 16, 1886.

CHAPTER 135 OF THE MISSISSIPPI LAWS OF 1876 READS AS FOLLOWS:

## CHAPTER CXXXV.

AN ACT to facilitate the Construction of Telegraph Lines in the State of Mississippi.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi,* That any telegraph company, chartered or incorporated by the laws of this or any other State, shall, upon making just compensation as hereinafter provided, have the right to construct, maintain and operate telegraph lines through any public lands of this State, and on, across and along all highways, streets and roads, and across and under any navigable waters, and on, along, and upon the right of way and structures of any railroad, and in case of necessity on, upon, or over any private land in this State; *Provided,* That the posts, arms, insulators and other fixtures of such telegraph lines be erected, placed, used and preserved in the usual manner of constructing, operating, and maintaining telegraph lines on, or along, and upon the right of way and structures of railroads, and on, across and along highways, roads and streets, and across and under navigable waters, and in such manner as not to interfere with the ordinary use of the ordinary travel and traffic on such highways, railroads, streets, or waters, or with the convenience of any land owner, more than may be unavoidable; *Provided further,* That

Right to construct and operate.

any such telegraph company, for the purpose of making through lines, or connections, may acquire by lease or purchase, or by any other lawful contract, the right to use, own and operate, as a part of its lines, and according to the terms of its charter, any other line or lines of telegraph which are now or may hereafter be constructed, and the owners of such other telegraph lines are hereby empowered to make such contracts, and said company so acquiring said lines shall have and enjoy all the rights, franchises and privileges theretofore vested in the former owners.

Contracts with other lines.

SEC. 2. *Be it further enacted,* That whenever any such telegraph company desires to construct its lines on, along or upon the right of way and structures of any railroad, or upon and along the roadway of any incorporated turnpike, or in case it should be necessary to construct the same under, on, or over any private land in this State, the said telegraph company shall, by its agents, have the right to peaceably enter upon and survey, locate and lay out its said lines thereon, and may contract with the owner or owners of any such railroad for the use of its right of way and structures, or with any turnpike company, for the use in its roadway for telegraph purposes; or may agree and contract with the owner of any land for an easement therein, for the purpose of constructing, maintaining and operating its telegraph lines, as herein

Right of way, how obtained.

provided; and in case said lands belong to the estate of any deceased person, then said company may agree and contract with the executors or administrator thereof; and if the same belong to a minor, or person *non compos*, then with the guardian, or in case said land be held by trustees of school sections, or other trustees of estates, then with such trustees; said executors, administrators, guardians and trustees being hereby declared competent to make such contract, which shall be binding ~~upon all parties~~ in interest; and said executors, administrators, guardians and trustees shall be liable, on their respective bonds, to account to those interested for any money received by them under said contracts or agreements; and if the parties and such company prefer, the question of compensation may be referred to arbirators mutually chosen, whose award, or, in case of disagreement, that of the umpire, shall be binding between the parties.

SEC. 3. *Be it further enacted*, That in case any telegraph company having the rights and privileges herein granted, for any cause, shall not agree with the owner or owners of any land, or with the executor, administrator, guardian or trustees of the estate to which the same belongs, or with the owners of any railroad or incorporated turnpike, on or in which an easement, right or privilege is sought, such telegraph company may file its

In case of disagreement.

petition in the office of the clerk of the circuit court of the county in which said land is located; or in case of a railroad or turnpike, then in the office of the circuit clerk of any county in which any portion of the said railroad or turnpike may be located, or through which the same may run. Said petition shall designate the land or railroad, and structures or turnpike, as the case may be, and the particular use, right, easement or privilege sought to be condemned. It shall also give the name of the petitioner, and shall give the place of residence, if the same be known, of the name or names of the reputed owner or owners of said property, or of the executor, administrator, guardian or trustees; and if the names and places of residence of the owners be not known to petitioner, the petition shall so state. Such petition shall be signed and sworn to by an officer or agent of the company, duly authorized in the premises.

Petition and proceedings thereunder.

SEC. 4. *Be it further enacted,* That such petition as hereinbefore provided, may be filed at any time and the proceedings thereunder had shall be *in rem* against such parcel, or parcels of land, or against such railroad and structures or turnpike roadway, such petition and proceedings in case the lands of private owners are proceeded against, shall only embrace or include in any one proceeding, the lands of one proprietor or owner, in case any right or privilege is claimed in any railroad rights of way and struc-

tures, or in any turnpike then the property of but one such railroad or turnpike, can be embraced in one petition.

SEC. 5. *Be it further enacted*, That upon the filing of such petition, the clerk shall cause a monition or notice from him of the filing of the petition and of the purport thereof in general terms, and of the time of the inquest and assessment of compensation hereinafter provided, to be posted by the sheriff or some other authorized person in some conspicuous place upon such parcel or parcels of land, railroad or turnpike, ten days before the said inquest, and assessment shall be made, and upon proof of such posting, by the return of the sheriff or oath of the person appointed, the authority of the commissioners hereinafter provided for shall be complete to proceed in the premises.

Notice of Inquest and assessment.

SEC. 6. *Be it further enacted*, That it shall be the duty of the clerk, upon the filing of such petition, to cause a notice in general terms thereof and of the time appointed for the inquest, to be served upon the owner or owners of said lands, or to be left at his, her, or their place or places of residence, at least five days before such assessment, if such owners are named in the petition reside in the county; and in case of a railroad or turnpike, the notice may be served upon any agent upon whom like notice and legal process could

Duty of clerk as to notice.

be served in other legal proceedings. If any such owners or their places of residence are not known, or stated in the petition, or if such owners, or any of them, reside out of the county, such notice shall be published by three consecutive weekly insertions in some newspaper published in the county in which such petition is filed, and if none be published in the county, then in some newspaper of one of the cities or towns of Mississippi which shall be nearest the said property.

Publication of notice.

SEC. 7. *Be it further enacted*, That upon the filing of any such petition the clerk shall forthwith issue a writ, commanding the sheriff to summon and to have on or near said land, railroad or turnpike, at the time in the writ to be mentioned, and within fifteen days if the owners are all known and reside in the county, or if not, then within thirty days, nine good and lawful men, citizens of the county, from whom and talismen, if need be, five commissioners shall be chosen, who shall be sworn by and under the direction of the sheriff to well inquire and true assessment make of the damages and compensation which the owner or owners of said parcel or parcels of land, railroad or turnpike, respectively, shall be entitled to have for the appropriation thereof, to the use of the petitioner as prayed for; and a majority of said commissioners may render the award.

Selection of Commissioners

SEC. 8. *Be it further enacted,* That the said commissioners may, if they so desire, inspect the road structure or land on which an assessment or privilege is sought, and the owners of any land, railroad or turnpike may intervene for their respective interests in the premises, and evidence may be offered by the petitioner in intervenor showing how the said property will be injured or affected by the construction of said works, and they may have the writ of subpoena issued by the clerk or sheriff to compel the attendance of its or their witnesses; but no delay shall be caused by any, nor shall evidence be received in respect to the title and ownership of said property; and in case either party shall object to the proof or introduction of any particular matter as a basis of a claim for damage, then the commissioners shall report separately and specially as to such matter, and state the allowance for the alleged damage as a special item, and such item may be reviewed in the manner hereinafter pointed out.

Intervention of owners.

SEC. 9. *Be it further enacted,* That if, at the time appointed for the inquest. the proper preliminary proceedings have not been had in respect to some or all of the parcels of land or other property in the writ described, the petitioner may discontinue as to such parcels, in which said proceedings have not been had, or the commissioners may adjourn the proceedings as to them to another day, and pro-

ceed with respect to those parcels of land as to which the proper proceedings have been had; and any vacancy occurring in said body of commissioners on the day to which any adjournment shall be made, or at any other time, such vacancy shall be filled by the sheriff, and in case the commissioners cannot agree, or on the application of petitioner pending any adjournment, other commissioners may be chosen to make such assessment.

Vacancies of commisions.

SEC. 10. *Be it further enacted,* That the commissioners, after making their award as hereinbefore provided, shall make and sign a report of their proceedings in the premises, and shall deliver the same into the hands of the sheriff, who shall make immediate return thereof, with the writ, and his action in the premises and upon the actual payment in cash, to the person or company entitled to receive the same, of the whole amount of the award made as hereinbefore directed, the said petitioner, and its assigns, shall have the full and perfect right to enter upon the property described, and to have, possess and enjoy the easements, rights and privileges thereon, as the same are in the petition set forth and claimed, and a full record shall be kept in said clerk's office of all proceedings had under this Act.

Report by Commissioners.

Returned by Sheriff.

Right of petitioner to enter.

SEC. 11. *Be it further enacted,* That for good cause shown by the petitioner, or any

owner, by motion to the judge of the circuit court, in which said proceedings were had, a new inquest and assessment may be had; *Provided*, said motion shall state the grounds upon which said new assessment is asked, and shall be supported by the affidavit of the party applying therefor, of the hearing of which motion the other party shall have at least five days notice. If, upon a consideration of the matter, a new inquest and assessment shall be ordered by the judge in respect to any such property, a new writ shall issue and all proceedings be thereon had, as on the first assessment; *Provided further*, That not more than one new inquest shall be allowed at the instance of the same party in reference to the same matter.

New inquest.

SEC. 12. *Be it further enacted*, That in case of objection by the petitioner or any owner to any item of damage, as mentioned in the eighth section of this Act, such objector must, within ten days after the return of the sheriff's writ, give five days notice to the other party that, at a time and place mentioned, he or they will present said objection to the circuit judge, who shall thereupon proceed to pass upon the validity of such objection; and if said judge sustains said objection he shall strike the said item from the award, and the balance then found assessed, if any, shall be paid by the petitioner; and if said petitioner shall have paid more than said final

In case of objection to items of damage.

and amended award, the balance shall be refunded by the party to whom the same may have been paid. and it shall be unlawful for the clerk, pending any controversy, to pay over the sum in dispute to the owners of any of said property; *Provided*, that from all orders of the said judge in reference to any proceedings under this Act, an appeal may be taken to the supreme court of this State within sixty days from the making of any such order, or from the final order therein made; the appellant being required to give security for the costs of the appeal as in other cases, but no appeal shall hinder or delay a petitioner who has paid to the party or parties entitled under the award to receive the same, the amount of the award from constructing and operating their lines on or over said property.

Appeal may be taken.

SEC. 13. *Be it further enacted*, That the sheriff may act by a regular sworn deputy, or the coroner may act as in other cases provided by law, and for any default of the clerk, sheriff, coroner, commissioners, witnesses, or other person, the penalty prescribed by law for like default, in cases pending in the circuit court, shall be enforced.

Default by clerk, sheriff, etc.

SEC. 14. *Be it further enacted*, That the fees to be allowed in proceedings under this Act shall be as follows: To the clerk, for the filing of each petition, fifty cents; for the issue



of each monition, or notice, twenty-five cents; for each copy thereof, when executed, fifteen cents; for each writ to sheriffs, one dollar; issuing subpoenas, each fifteen cents, to be paid by party ordering the same; for filing the report of the commissioners and return of the sheriff, fifty cents; for filing any other paper or motion, ten cents; for issuing any other notice, twenty-five cents; for final record and advertising, same as allowed by law in other cases; to the sheriff, for posting monitions, each, seventy-five cents; serving notice, each, fifty cents; summoning and organizing the commissioners, three dollars; for presiding at the inquest and assessment for each day actually employed, three dollars; returning writ and report of commissioners, one dollar; issuing subpoenas, same as clerk; to the commissioners, three dollars for each day actually employed.

Fees.

SEC. 15. *Be it further enacted*, That at the time of the filing of its said petition, such telegraph company may be required to give security for the costs of the proceedings; and if said petitioner shall, before, or after the filing of said petition, tender to the owner of any parcel of land, railroad or turnpike as much or more money than the amount of the award, then such owner or owners shall be required to pay all costs occuring subsequently to said tender, and in case several parcels of land are included in one report, the amount

When owner required to pay costs.

taxed against said owner as his share of the costs, shall be (in) proportion to his share of the total amount of compensation awarded in the report.

SEC. 16. *Be it further enacted*, That any company assuming to have or enjoy any of the rights herein granted, shall, upon opening any office for business in this State, be required to pay a privilege tax, to be fixed by law, not to exceed one thousand dollars, and said company shall appoint an agent in each county through which its lines may be constructed, upon whom any process may be served in any suit brought against it in any of the courts of this State.

Privilege tax

SEC. 17. *Be it further enacted*, That all laws and parts of laws contravening the provisions of this Act are hereby repealed, and that this Act take effect and be in force from and after its passage.

APPROVED, April 5th, 1876.

THE MISSOURI ACT OF NOVEMBER 17, 1855, READS AS FOLLOWS:

## CHAPTER CLVI.

## TELEGRAPH COMPANIES.

## AN ACT CONCERNING TELEGRAPH COMPANIES AND ELECTRIC TELEGRAPHING

§ 1. All telegraph companies to be governed by the provisions of this act.

§ 2. Lines may be constructed upon public highways, and across the waters of the State.

3. City and town authorities may direct construction of lines, where.

4. Proceedings where persons are aggrieved by using their land for telegraph lines.

5. Penalty for failing to transmit dispatches; proviso.

6. Liability for special damages, when.

7. Dispatches to be delivered by messenger, when.

8. To be sent by mail, when.

9. Railroad companies may become stockholders in telegraph companies or may construct telegraphs along their roads.

10. Process or notice, how served on telegraph company.

*Be it enacted by the General Assembly of the State of Missouri, as follows:—*

Telegraphic companies to be governed by the provisions of this act.

Section 1.—Every corporation, owner or association, engaged in telegraphing for the public, by electricity, in this State, shall be subject to the liabilities, and (be) governed by the provisions, contained in this act.

Lines may be constructed upon public highways, and across the waters of the State; proviso.

Sec. 2.—Any company incorporated for the purpose, may construct lines of electric telegraph upon and along any of the highways and public roads, and across any of the waters within the limits of this State, by the erection of the necessary fixtures, including

posts, piers or abutments, for sustaining the wires of such lines: *Provided*, The same shall be so constructed as not to incommode the public use of said highways or roads, or endanger or interrupt the navigation of said waters; nor shall this act be so construed as to authorize the erection of any bridge across any of the waters of this State.

Acts 1851, p. 286.

City and town authorities may fix the location, and direct ode of constructing telegraph lines, where.

Sec. 3.—The mayor and aldermen of any city, and the trustees of any incorporated town, through which the lines of such company are to pass, either by ordinance or by writing, may specify where the posts may be located, the kind of posts that may be used, the height at which, and the places where, the wires may be run; and such company, in erecting their line, shall be governed by the regulations therein prescribed. After the erection of said telegraph lines, the said mayor and aldermen, or trustees, shall have power to direct any alteration in the location or erection of said posts, piers or abutments, and, also, in the height at which the wires shall run, having first given such company, or their agents, opportunity to be heard on such alteration.

Ibid.

Proceedings where persons are aggrieved by using their land for telegraph lines.

Sec. 4.—If any person, over whose lands any telegraph line shall pass, upon which said posts, piers or abutments, shall be placed, shall consider himself aggrieved or damaged thereby, it shall be the duty of the county court within whose county such lands are,

on the application of such person, and on notice to the company, association or individual, owning such telegraph line, to appoint three discreet and disinterested persons as appraisers, who shall severally take an oath, before any person authorized to administer oaths, faithfully and impartially to perform the duties required of them by this act. And it shall be the duty of said appraisers, or a majority of them, to make a just and equitable appraisal of all the loss or damage sustained by said applicant, by reason of said lines, posts, piers or abutments; duplicates of which said appraisement shall be reduced to writing and signed by said appraisers or a majority of them; one copy shall be delivered to the applicant, and the other to the president or other officer of said association, or corporation, or owner of such telegraph, on demand; and, in case any damages shall be adjudged to said applicant, the association, or corporation, or telegrapn owner, shall pay the amount thereof, with costs of said appraisal, said costs to be liquidated and ascertained in said award. And said appraisers shall receive for their services, two dollars for each day they are actually engaged in making said appraisement.

Ibid.

Appraisal of damages, &c.

Sec. 5.—Every such association, corporation, company or owner, having a line of wires wholly or partly in this State, and engaged in telegraphing for the public, shall, during the usual office hours, receive dis-

Penalty for failing to transmit dispatches.

patches, whether from other telegraphic companies, or from individuals; and, on payment or tender of the usual charge, according to the regulations of such company, shall transmit the same, with impartiality and good faith, and in the order of time in which they are received, under penalty, in case of failure to transmit, or if postponed out of such order, of one hundred dollars, to be recovered by the person whose dispatch is neglected or postponed: *Provided, however,* That arrangement may be made with publishers of newspapers, for the transmission of intelligence of general and public interest out of its order, and that communications for and from officers of justice shall take precedence of all others.

Proviso.

Liability for special damages, when.

Sec. 6.—Such associations, corporations, companies or owners, shall be liable for special damages occasioned by failure or negligence of their operators or servants, in receiving, copying, transmitting, or delivering dispatches; and, for the disclosure of any of the contents of any private dispatch to any person other than to him to whom it was addressed, or to his agent, they shall be liable to the sender of the dispatch, and the person to whom it was addressed, in the sum of fifty dollars to each, recoverable by an action before a justice of the peace, and for all special damages in addition thereto; or, for the disclosure of the contents of any private dispatch



to any person other than to him to whom it was addressed, or his agent. *(a)*

Dispatches to be delivered by messenger, when.

Sec. 7.—Such companies or owners shall deliver all dispatches, by a messenger, to the persons to whom the same are addressed, or to their agents, on payment of any charges due for the same: *Provided,* Such persons or agents reside within one mile of the telegraphic station, or within the city or town in which such station is.

To be sent by mail, when.

Sec. 8.—If such persons or agents do not reside as above specified, such companies or owners shall, if so directed, and upon payment of postage, send the same, postage prepaid, by post, to them, to such post-office as may be named.

Railroads may be stockholders in telegraph companies, or may construct telegraphs along their roads.

Sec. 9.—A railroad company may become a stockholder in a telegraph company, or may construct a telegraph to connect two or more points on their railroad. And if such railroad company entirely own such telegraph line, they shall not be bound to telegraph for the public unless they undertake to do so.

Process or notice, how served on telegraph company.

Sec. 10.—Process or notice, served upon any clerk or agent of any telegraph company, at any of the offices of such company, shall be sufficiently served for all purposes whatsoever.

IN THE SUPREME COURT OF MISSISSIPPI

GEORGE M. HODGES, City Tax Collector, APPELLANT

V.

WESTERN UNION TELEGRAPH CO APPELLEE

Note: *The following opinion, rendered by the Supreme Court of Mississippi on May 20, 1895, is taken from 72 Miss. 910, with the syllabus omitted. The note appended on the first page is from 29 L. R. A. 770. The opinion without the reporters' note and summary of arguments of counsel also appears in 18 So. 84.*

Action by the City of Meridian against Western Union Telegraph Company, to recover rent claimed to be due for the use, by the defendant, of the streets of the city for its telegraph poles. The demand is based upon an ordinance of the city passed in June, 1893, requiring all telegraph companies doing business in the city to pay, as rent to the city, the sum of $2.50 per annum for each telegraph pole erected and used in the streets, alleys and public places therein. The sole question presented is the validity of said ordinance. The facts touching this question sufficiently appear in the opinion. The case was tried in the Circuit Court, without a jury, and resulted in a judgment for the defendant.

Cochran & Bozeman for appellant.

The ordinance is copied from an ordinance of the city of St. Louis, the validity of which was sustained in the case

Note: (from 29 L. R. A. 770) That muncipal charges for poles and wires of a telegraph company placed in its streets are not precluded by the interstate character of the business, is shown by **Postal Teleg. Cable Co. v. Baltimore (Md.)** 24 L. R. A. 161, and note. The Maryland case was affirmed by the Supreme Court of the United States in 156 U. S. 210, 39 L. ed. 399. The present case is in no way inconsistent with the doctrine there declared, as it turns on the relation of the municipality to state authority.

of *St. Louis v. Telegraph Company*, 148 U. S. 92. It was conceded that, if the charter of Meridian confers as complete control over its streets as does the charter of St. Louis, appellant should have had judgment. The charter of Meridian gives it full power to keep in repair all necessary streets, alleys, avenues, etc., and to pass all necessary regulations for the same. It gives the city full power to regulate the use of streets. In the said case of *St. Louis v. Telegraph co.*, on rehearing *(149 U. S. 465)*, the court said: "The word 'regulation' is one of broad import. It was a word used in the federal constitution to define the powers of congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be." The court in that case further says: "Unless, therefore, the telegraph company has some superior right which excludes it from subjection to this control of the city over its streets, it would seem that the power to require payment of some reasonable sum for the exclusive use of a portion of its streets was within the grant of power to regulate the same."

The charter of Meridian further gives the power to pass all ordinances, bylaws and resolution necessary and requisite for the government of said city and the welfare of its inhabitants, provided the same shall not be contrary to the constitution and laws of the state. It seems difficult to frame a provision broader and more sweeping than this. The charter, moreover, empowers the city to grant rights of way to railroad companies for the construction of railways over the streets and through and over the public property of the city. Certainly this is a recognition of the rights as to the streets and public property of the city.

Mayes and Harris, for Appellee.

The case of *St. Louis v. Telegraph Co.*, 148 U. S. 92, is not authority in this case unless it can be shown that the City of Meridian stands upon the same footing as the City of St. Louis, as to its powers.

In that case the court says that the City of St. Louis occupies a unique position. Its powers were not derived by legislative grant, but it framed its own charter under express authority of the people of the state, given in the constitution. Its charter is an organic act, and the City of St. Louis is in a just sense an *imperium in imperio*. On the contrary, the charter of the City of Meridian and the powers of its municipal authorities come directly from the legislature, and the legistlature, so far as regards the rights of the City over its streets, possesses unlimited control. Sec. 15 Am. and Eng. Enc. L. 988; 24 Iowa, 455; 25 N. Y. 526; 27 Ib. 188; 14 Wis. 609; 36 Pa. St., 99; 13 La Ann., 326; 88 Am. Dec. 148; 15 B. Mon. (Ky), 642; 34 Iowa, 249; 80 Ill., 317; 47 Pa. St., 349 45 Iowa, 338; Dill. Mun. Cor., Sec. 702, and cases cited in note; *Meriwether v. Garrett*, 102 U. S., 472. Our constitution does not in any way entrench upon the rights of abutting owners or private individuals whose property is affected by the use of the streets. The act of 1886 makes no provision for compensation to cities, but only provides for compensation where private rights are invaded. The right of the telegraph company, in this case, rests upon express legislative permission to use the streets and public highways without compensation. This is not an attempt to evade paying taxes; these are provided for elsewhere. The demand is for rent in addition to taxes. The judgment should be affirmed.

WHITFIELD, J. The ground upon which the ordinance of the city of St. Louis, of which the one in this case is said to be a copy, is placed in *St. Louis v. W. U. Tel Co.*, 148 U. S.

92, 13 Sup. Ct. 485, and 149 U. S. 465, 13 Sup. Ct. 990, is that the city of St. Louis is the absolute owner of the fee in its streets, and the charter powers of the city are "self-apointed." It is expressly declared that St. Louis occupies "an unique position." "It does not, like most cities, derive its powers by grant from the legislature; but it framed its own charter under express authority from the people of the state, given in the constitution." And again it is said: "This charter is an organic act, —so defined in the constitution, —and is to be construed as organic acts are construed. The city is, in a very just sense, an imperium in imperio. Its powers are self-appointed, and the reserved control existing in the general assembly does not take away this peculiar feature of its charter." Treating the city, therefore, as the absolute and uncontrolled proprietor of its streets, rent, which is like toll, a "demand of proprietorship," and not like a tax, "a demand of sovereignty," was declared to be within the power of the city to exact. Meridian occupies a very different attitude, as to its streets and its power over them. All the power which it has over its streets is derived from the legislature, whose power over them is "supreme and transcendent," to use Judge Dillion's language. We are not advised by the record whether the fee in the streets of Mridian is in the city, or whether the city has a mere easement; but it is not denied that the power of the city to deal with the streets is derived wholly from a charter granted by the legislature, and hence, of course, under legislative control. The legislature, by the act of 1886 (Laws 1886, p. 93) Sec. 1, provided "that any telegraph company, chartered by the laws of this, or any other state of the United States, shall, upon making due compensation, as hereinafter provided, have the right to construct, maintain and operate telegraph lines * * * on across and along all * * * streets, * * " etc., "provided that 'there shall be no interference with the ordi-

nary use of such streets,' etc., or with 'the convenience of any land-owners, more than may be unavoidable." The following sections provide for compensation to turnpike and railroad companies, and private owners, for the use and occupation of their "ways," "structures," or lands. No compensation was provided for cities, in case their streets should be used; but the use and occupation of so much of the streets of cities as may be reasonable needed for the construction and maintenance of telegraph poles and telegraph lines is expressly authorized, without compensation to the state or to the cities, —municipal subdivisions of the state. Without this act the appellee could not have entered upon the streets of the city of Meridian for the purpose of constructing and maintaining its telegraph lines; and under it, it could only have so entered and occupied its streets, with its poles, by virtue of the right of eminent domain, upon due compensation first made, had not the terms of the act clearly shown that such compensation was dispensed with. Had such compensation been required, such damages awarded, in such exercises of the delegated right of eminent domain, such compensation would have been made, such damages awarded, for the use and occupation of said streets by said telegraph company with its poles, wires, etc. And it is this identical use and occupation for which the city seeks here to recover rent under the ordinance in question. The ordinance is entitled: "An ordinance to fix the rent charged telegraph * * * companies * * * for the use of the streets," etc. It is manifest that if the state, having "supreme and transcendent" power over the streets of Meridian, granted the appellee the right to so use and occupy the streets without compensation to the state or the city, then the city of Meridian, a political, municipal subdivision of the state, cannot, by ordinance, affect the license thus granted. It is revocable at the pleasure of the state, but not of the city, unless grant-

ed such power by the state, so far as affects it.

It is to be noted that this is not a tax. The license is a mere permission to enter the streets of the city, and so use and occupy them, without paying the damages usually assessed and paid, when the right of eminent domain is used for condemning rights of way in streets, etc. It is a permissive statute. What it grants is a mere license, revocable by the state. 148 U.S. 102, 13 Sup. Ct. 485. It was not intended to exempt the appellee from the "ordinary burdens of taxation." But this is not a tax, and the scheme for taxation of telegraph companies is elsewhere fully provided. Code 1892, §§ 3880, 3885. And this scheme is directed to be so arranged that "each municipality shall receive its just share of such taxes, proportionately to the amount of property therein situated."

The act conferring the charter powers, it will be noted, was passed prior to the act of 1886, —April 9, 1874. We have nothing to do with the wisdom of the act of 1886, doubtless passed at the instance of telegraph and telephone companies, but, under its provisions, feel constrained to affirm the judgment. See Dill. Mun. Corp. (4th Ed.) § 701 et seq.; *People v. Kerr*, 27 N. Y. 188; *Meriwether v. Garrett*, 102 U. S. 472, 15 Am. & Eng. Enc. Law, 988, and authorities cited.

We are not to be understood as denying or restricting the power of the city to regulate the use of its streets within legal limits. See *Elliott, Roads & S.* pp. 332, 333. This is not an ordinance regulating the use of its wires and poles by the company, nor the use of the streets by the company in the occupation of them by poles, but one exacting a certain sum as rent, pure and simple, from the company, for the identi-

cal entry upon and occupation of the streets by the company, with its poles, which it was authorized by the act of 1886 to make, without compensation to the state or city, in the exercise of the right of eminent domain. The act, it will be observed, provided that such use of the streets must not interfere with their ordinary use as such. In *City of Clinton v. Cedar Rapids & M. R. R. Co.*, 24 Iowa, 469, Dillon, C. J., speaking for the court, says: "By virtue of these charter provisions, and this ownership of the fee, the city claims that it has the exclusive control of the streets, and therefore it may consent to or prohibit as by its common council it shall deem best for the public interest, the use of its streets for railway purposes, and that courts cannot interfere with or control the decision of the common council respecting this matter, whatever that decision may be. If these were all the provisions of the law applicable to this subject, the position of the city might, and, I think, would, be well taken." He then proceeds to notice two other statutes of similar purport with our act of 1886, supra, as affecting this question, and then, at page 473, continues: "But it is a mistake to suppose that when the fee of the streets is in the city, in trust for the public, the city is constitutionally and necessarily entitled to compensation, the same as a private proprietor holding the fee. * * * The constitutional provision is that private property shall not be taken for public use without compensation to the owner. The streets of the city are not the private property of the corporation, in such a sense that the legislature cannot, so far as regards the corporation, authorize the same to be used for any public purpose for which it may see fit, unless it makes compensation to city for such use." We refer specially to the entire reasoning in this case. Of course, the use of the streets by the telegraph company is "subject to all reasonable police and other regulations," in Judge Dillon's language in another

part of this opinion; and, as we have shown, no question of taxation is here involved, nor any private rights of any "landowner." The case of *Donnaher v. State,* 8 Smedes & M. 649, though not referred to by counsel, has not escaped our careful attention. We are disposed to think that the decision in that case may possibly be upheld on the ground that, as urged by the distinguished conusel for appellee, —the late Judge William Yerger, —the charter of the railroad company expressly stipulated that the company could not make its road, "so as to interfere with the passage of any of the public streets of the town"; from which it might have been argued, as he did argue, that the tracks could not be laid in the streets at all, so far as the railroad's charter power to do so was concerned. It would seem that the court, however, went rather on the ground that, as stated in the opinion, "the statute of 1823 reserved to the legislature the right to dispose of the entire two sections of land designated by the commissioners to locate the seat of government, except the streets," etc., and hence that "this vested the title to the streets in the corporation of the city, and deprived the legislature of the power to dispose of them, except so far as the jus publicum, or the right of eminent domain, might authorize it." If the decision is sound, —and it must be remembered that Mr. Justice Thacher dissented, —it is only on the first ground. Otherwise the decision, like the general language of the opinion of the majority of the court, speaking through Mr. Justice Clayton, is justly amenable to the criticism pronounced on it by Judge Dillon in the second volume (fourth edition) of his work on Municipal Corporations (section 701, note 3, p. 834), where he says: "A different view has been sometimes taken. Thus, in *Donnaher v. State,* 8 Smedes & M. 649, the court decided that, where the statute under which a city was laid out vested the title of the streets in the city, such streets cannot be sub-

jected to the use of a railroad, without the consent of the city, unless the damages to the city are assessed and paid. In other words, the legislature can only interfere with the use of the streets of the city by its exercise of the right of eminent domain, and if it exercise this right it must compensate the city. But this conclusion seems to have been adopted without sufficient reflection, and is undoubtedly erroneous"; citing authorities. "The ground on which the city of Jackson stands was given to the state of Mississippi by the general government," as said by Judge Yerger in his brief; and this fact, connected with the "reservation of the right of the legislature to dispose of the entire two sections of land, except the streets." etc., hereinbefore adverted to as emphasized by the court, seems to have confused Judge Clayton, —at least, to have left him with rather indistinct conceptions on the power of the legislature, generally to deal with the streets of a city. For we find him saying (page 660) that "this principal (of compensation being made for private property taken for public use) applies as forcibly to the streets, in this instance, as to private property in other cases"; seemingly holding that the streets of Jackson are its "private property," in the same sense that any individual's property is his "private property." And the case immediately cites *Tuckahoe Canal Co. v. Tuckahoe & J. R. R. Co.*, 11 Leigh, 76, which is one of a canal company against a railroad company; both private (not muncipal) corporations. And a more extraordinary thing still is the announcement, on page 661, that "at present we are strongly inclined to the belief that the owners of lots adjacent to the track of the railroads will have no claim to compensation, because they have no right of soil in the streets," a proposition, the converse of which is everywhere now established law. We are not, of course, saying here anything as to the streets of Jackson, but are merely putting this case of *Donnaher* in its only solvable

light, as to the particular decision therein made, if in that light it be solvable. In so far as the general language of the opinion of the court in that case conflicts with the views herein announced, it is, as said by Judge Dillon, "undoubtedly erroneous," and is to that extent hereby overruled. Affirmed.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

## No. 546

CITY OF MERIDIAN,
*Defendant-Appellant,*

vs.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, *Plaintiff-Appellee.*

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

## MOTION OF APPELLEE TO DISMISS AND/OR AFFIRM, AND BRIEF IN SUPPORT THEREOF


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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

## No. 546

CITY OF MERIDIAN,
*Defendant-Appellant,*

VS.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, *Plaintiff-Appellee.*

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

## MOTION OF APPELLEE TO DISMISS AND/OR AFFIRM, AND BRIEF IN SUPPORT THEREOF

Appellee herein moves the Court:

(1) To dismiss the appeal filed by appellant pursuant to 28 U.S.C., Sec. 1254 (2), for the reason that both the District Court and the Court of Appeals held that the state statute upon which appellant relies was repugnant not only to the Federal Constitution but the Constitution of Mississippi as well. Hence, regardless of this Court's determination of the Federal constitutional question, the result reached below will not be changed.

(2) In the alternative, to affirm the judgment of the Court of Appeals on the ground that the questions raised in appellant's Statement as to Jurisdiction are so unsubstantial as not to require further argument.

## STATEMENT OF THE CASE

This cause was commenced by the filing by plaintiff-appellee of a suit for a declaratory judgment in the United States District Court for the Southern District of Mississippi, attacking the constitutionality of Section 5 (e), Chapter 372, Mississippi Laws of 1956, insofar as said section required appellee to pay 2% of its gross receipts to appellant as compensation for the privilege of occupying the streets of the City of Meridian with its telephone lines. The complaint alleged that the requirement of the act that appellee pay compensation to Meridian for the use of its streets was repugnant to Article I, Section 10 of and the Fourteenth Amendment to the United States Constitution and Article 3, Section 16 of the Mississippi Constitution[1] (R. 11).

The 2% charge is admittedly not a tax, but a charge in the nature of rental. The taxing and police powers of the state or city are not involved.

All the facts in the case were stipulated before the District Court, and the case was heard by the court without a jury. The stipulated facts show that following the passage of Chapter 38 of the Mississippi Laws of 1886[2], the appellee or its predecessors continuously and from year to year extended and enlarged their facilities and their use and occupancy of the streets of Meridian, as well as other highways and streets throughout the State of Mississippi

1. "*Ex post facto* laws, or laws impairing the obligation of contracts, shall not be passed." *Mississippi Constitution, 1890.*

2. This act is set out in full on page 28 of the Appendix to Appellant's Statement as to Jurisdiction. In short, it authorized all telephone companies to occupy the streets and highways of the state with their facilities and contained no provision whatever for any compensation to be paid to municipalities or the state.

(R. 34; 36; 41; 238-240). It was and is now the contention of appellee that such construction, expansion and extension of telephone lines on the streets of Meridian and other streets and highways constituted an acceptance of the offer contained in the 1886 Act, and that such acceptance created a contract between the State of Mississippi and the telephone company, which is fully protected from impairment by both the Federal and State Constitutions. The contentions and argument of appellee as to the creation of a contract are summarized in the opinion of the Court of Appeals (256 F. 2d 83, 87):

> " 'The following propositions of law, which were sustained by the lower court, have been firmly established by judicial decisions of the United States Supreme Court, other federal courts, and state courts:
>
> " '(1) The Legislature of Mississippi in 1886 had plenary control over all highways and streets of the state, whether within or without municipalities, and the Act of 1886 was an offer to telephone and telegraph companies of the right to make use of all such highways and streets for the purpose of providing the citizens of this state with telephone service. This right was granted without any requirement of paying compensation to either municipalities or the state. The companies were already operating in the state, obviously on a small scale—the industry was in its infancy—the legislature wanted the industry to expand —note the title to the Act, page 8, supra.
>
> " '(2) That the continued maintenance of poles and lines and other facilities after 1886, as well as the continued construction, expansion, and extension of such lines on the public streets of Meridian and other streets and highways throughout the State of Mississippi constituted an acceptance by the telephone company and its predecessors of the offer of the right to

use all streets and highways which was contained in the 1886 Act.

"'(3) That these acts of acceptance resulted in the creation of a perpetual and irrevocable contract between the Telephone Company, on the one hand, and the State of Mississippi, on the other, which contract right is protected from impairment by the provisions contained in both the Federal and State Constitutions prohibiting the impairment of the obligation of contracts.

"'(4) The imposition upon appellee of an obligation to pay two percent of its monthly service charges as compensation for the use of the streets of Meridian constitutes an unlawful attempt to violate the obligations of a contract which was created and has been in existence for more than seventy years, and is therefore violative of the constitutional prohibitions. It would place an additional burden on the vested rights of the plaintiff.

"'The various arguments advanced by appellant in its brief were argued at great length to the district court. The court, after giving consideration to all these contentions, and after reviewing the circumstances and conditions which existed at the time of the passage of the 1886 Act, concluded that the Act extended an invitation and offer which, when accepted, resulted in a contract which is protected not only by the Federal Constitution *but by the State Constitution of Mississippi as well.*'" (Emphasis supplied).

The District Court granted the relief sought by appellee and entered the judgment which is set out in full in the opinion of the Court of Appeals (256 F. 2d at 85). It appears in the record at pp. 252-253. As will be seen from paragraph No. 3 of this judgment, the District Court specifically held that the Mississippi Act of 1956, insofar as it required compensation to be paid to appellant City, was

"in conflict with the Constitution of the State of Mississippi and the Constitution of the United States." On appeal the Court of Appeals affirmed the District Court (R. 284), and stated in its opinion (256 F. 2d at 87):

> "Upon a careful examination of the briefs and arguments in the light of the record made below, we find that they present nothing for our consideration that was not presented to, and considered by, the district judge, with whose judgment and with the reasons given for it in his thoughtful and thorough opinion, we find ourselves in full agreement. * * *"

## ARGUMENT

### I.

### This Case Is Not Reviewable by Appeal

The appellant has asked this Court to review by appeal, under 28 U.S.C., Sec. 1254 (2), the judgment of the Court of Appeals, even though that judgment rests as much on a State constitutional ground as on a Federal constitutional ground.

Section 1254 (2) is narrowly drawn and provides for review by appeal in a very limited class of cases. We respectfully submit that appellant should have sought review by certiorari. The portion of Section 1254 (2) providing for "appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution * * * of the United States," must be read in the light of the further provision in Section 1254 (2) that the "review on appeal shall be restricted to the Federal questions presented."

When so read it seems obvious that Congress intended to provide for appeal *only* in those cases where a state

statute is held by a court of appeals to be invalid *solely* because of a conflict with the Federal Constitution, treaties or laws.

Even if this Court should pass on the Federal question, its decision would only be an academic discussion which would not change the result of the litigation, since the terms of Section 1254 (2) prevent review of the State constitutional question.

While we know of no case ruling squarely on the point we raise here, we believe that *United States* v. *Hastings*, 296 U.S. 188, 193, 80 L. Ed. 148, 150, 151, 56 S. Ct. 218 (1935) and cases therein cited, support our position by analogy and in principle.

None of the cases cited by appellant in support of jurisdiction (p. 4 of Statement as to Jurisdiction) is in point. In fact only the *City of Chicago*, *City of Detroit*, and *Watson* cases involved appeals prosecuted under Sec. 1254 (2), and in each of those cases the Court of Appeals had held state statutes invalid *only* because of conflict with the Federal Constitution. No State constitutional provision was raised or passed upon.

Appellant contends that the "Questions Presented," as stated by it, all arise under the Federal Constitution. As shown, appellant ignores the fact that in the present case the State statute was held to be in violation of *Article 3, Section 16* of the Mississippi Constitution, as well as the Federal Constitution.

For the foregoing reasons, it is submitted that the appeal should be dismissed.

II.

**The Decision Below Is Clearly Correct**

The two courts below have applied principles long established by this Court and followed by an unbroken line of Federal and State court decisions. In fact, both decisions are an adherence to this Court's decision in the case of *Russell* v. *Sebastian*, 233 U.S. 195, 58 L. Ed. 912, 34 S. Ct. 517 (1914), and prior cases cited in that decision.

If there was ever any doubt about the proposition, it was settled by the *Sebastian* case that, whether granted by a state constitutional provision, a municipal ordinance, or a legislative act, authority granted to a utility to use public streets in furtherance of its public service, ripens into a contract protected from impairment, when acted upon by the construction, extension and expansion of utility facilities on such streets. This Court has said that the plainest principles of justice and right support the rule.

Among other considerations which this Court has held support the rule are the state's interest in obtaining comprehensive and efficient utility services; the public and permanent nature of the businesses such companies conduct; and the substantial investment usually contemplated. See *City of Louisville* v. *Cumberland Telephone and Telegraph Company*, 224 U.S. 649, 56 L. Ed. 934, 32 S. Ct. 532 (1912); *Owensboro* v. *Cumberland Telephone and Telegraph Co.*, 230 U.S. 58, 57 L. Ed. 1389, 33 S. Ct. 988 (1913).

Where a state has entered into a contract with a utility conferring the right to use public streets and highways without the payment of compensation, it is not within the power of the state later to require the payment of compensation. Certainly, the right to do an act free of charge

is impaired, if not entirely destroyed, by a requirement that a charge be paid.

In addition to the *Sebastian*, *Louisville*, and *Owensboro* cases, the following additional authorities demonstrate the correctness of the decision below:

*City of Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, 43 L. Ed. 341, 19 S. Ct. 77 (1898);

*Boise, etc., Water Co.* v. *Boise City*, 230 U.S. 84, 57 L. Ed. 1400, 33 S. Ct. 997 (1913);

*Grand Trunk, etc., Company* v. *South Bend*, 227 U.S. 544, 57 L. Ed. 633, 33 S. Ct. 303 (1913);

*New Orleans Gas Light Company* v. *Louisiana Light, etc., Co.*, 115 U.S. 650, 29 L. Ed. 516, 6 S. Ct. 252 (1885);

*New York Electric Lines Co.* v. *Empire City Subway Company*, 235 U.S. 179, 59 L. Ed. 184, 35 S. Ct. 72 (1914);

*Ohio Public Service Company* v. *State of Ohio*, 274 U.S. 12, 71 L. Ed. 898, 47 S. Ct. 480 (1927);

*Southern Bell Telephone and Telegraph Company* v. *City of Mobile*, 162 Fed. 523 (C. C. Ala. 1907), affirmed 174 Fed. 1020 (C. A. 5 1909);

*Phenix City* v. *Southern Bell Telephone and Telegraph Co.*, 33 F. Supp. 283 (M. D. Ala. 1940);

*Pacific Telephone and Telegraph Company* v. *City of Los Angeles*, 44 Cal. 2d 272, 282 P. 2d 36 (1955);

*City of Petaluma* v. *The Pacific Telephone and Telegraph Company*, 44 Cal. 2d 284, 282 P. 2d 43 (1955);

*Los Angeles County* v. *Southern California Telephone Company*, 32 Cal. 2d 378, 196 P. 2d 773 (1948), appeal dismissed 336 U.S. 929, 93 L. Ed. 1090, 69 S. Ct. 737 (1949);

*Postal Telegraph-Cable Company* v. *Railroad Commission of California*, 200 Cal. 463, 254 Pac. 258 (1927);

*City of Seattle* v. *Western Union Telegraph Company*, 21 Wash. 2d 838, 153 P. 2d 859 (1945);

*City of New Orleans* v. *Great Southern Tel. and Tel. Co.*, 40 La. Ann. 41, 3 So. 533 (1888);

*Traverse City* v. *Consumers Power Company*, 340 Mich. 85, 64 N.W. 2d 894 (1954);

*City of Lansing* v. *Michigan Power Co.*, 183 Mich. 400, 150 N.W. 250 (1914);

*Mayor and Council of Crisfield* v. *Public Service Commission*, 183 Md. 179, 36 A. 2d 705 (1944);

*People* v. *Deehan*, 153 N.Y. 528, 47 N.E. 787 (1897).

Appellant asserts (Statement as to Jurisdiction, p. 18) that the opinions below directly conflict with earlier decisions of this Court in *St. Louis* v. *Western Union Telegraph Company*, 149 U.S. 465, 37 L. Ed. 810, 13 S. Ct. 990 (1893) and *Bankers Trust Company* v. *Raton*, 258 U.S. 328, 66 L. Ed. 642, 42 S. Ct. 340 (1922) as well as with the decision of the Court of Appeals for the Sixth Circuit in *Memphis* v. *Postal Telegraph Cable Company*, 145 Fed. 602 (1906). There are vast differences between the *Raton* case, the *Postal Telegraph* case and the present case.

Any apparent conflicts between language used in the *St. Louis* case and the opinions of the courts below have been eliminated by decisions of this Court rendered subsequent to the *St. Louis* case.

In the *Raton* case a water company, incorporated for the express purpose of furnishing water to the people of the City of Raton, made a contract with the City to supply it with water for a period of 25 years. This period expired, and an injunction was sought to prevent the City from ousting the company from the use of the City's streets. The water company contended that a New Mexico act of 1887 granted it the right to use City streets free of interference. The City, on the other hand, argued that the 1887 Act was not intended to repeal an earlier 1884 Act which authorized the City to erect water works

or to grant private individuals such power for a term not exceeding 25 years. The Supreme Court of New Mexico had earlier held that the water company's franchise was granted by the City. Under these facts, this Court held that the company was estopped from claiming that its rights did not spring from the contract made pursuant to the terms of the 1884 Act. This is a far different case from the present case. The Mississippi Supreme Court, in *Hodges* v. *Western Union Tel. Co.*, 72 Miss. 910, 914, 18 So. 84 (1895), said:

> "* * * Without this act [the same 1886 Act on which appellee relies in the present case] the appellee could not have entered upon the streets of the City of Meridian for the purpose of constructing and maintaining its telegraph lines; and under it, it could only have so entered and occupied its streets, with its poles, by virtue of the right of eminent domain, upon due compensation first made, had not the terms of the act clearly shown that such compensation was dispensed with. * * *"

In the light of this pronouncement by the Mississippi Court, there can be no doubt as to the source of the present appellee's right to use the streets of Meridian.

It is clear that both lower courts considered the appellant's contention that appellee was estopped from claiming rights under the 1886 Act, and found it to be without substance. (See opinions of the Court of Appeals and the District Court at pp. 9, 11-12, and pp. 23-27, respectively, of appellant's Appendix to Statement As to Jurisdiction).

*Memphis* v. *Postal Telegraph Cable Company*, 145 Fed. 602 (6th Cir. 1906), has no conceivable application here. The distinction made by the Fifth Circuit in the present case is sound. Furthermore, the Tennessee statute involved in the *Memphis* case had never been construed by the

Tennessee Supreme Court. The Federal Court felt that the particular Tennessee statute there involved did not authorize the use of municipal streets without a charge. That holding is directly contrary to the Mississippi Supreme Court's interpretation of the Mississippi Act of 1886.[3] Since the Federal Court there construed the Tennessee statute as not having authorized the use of the streets free of charge in the first place, the appellate court was not called upon to and did not pass upon the question involved in the present case.

The language in *St. Louis* v. *Western Union Telegraph Co.*, 149 U.S. 465, 470, 37 L. Ed. 810, 814, 13 S. Ct. 990 (1893), which appellant says is in conflict with the holding below, is (149 U.S. at 470):

> "* * * It is true that, prior to that time, and by the Act of November 17, 1855 (2 Mo. Rev. Stat. 1855, p. 1520), the right was given to every telegraph corporation to construct its lines along the highways and public roads; but that was superseded by the legislation of 1866; and when in force it was only a permission, a license, which might be revoked at any time; and, further, whatever rights, if any, this defendant may have acquired to continue the use of the streets already occupied at the time of the revision of 1866, it cannot with any show of reason be contended that it received an irrevocable power to traverse the state and occupy any other streets and highways."

---

3. "* * * No compensation was provided for cities, in case their streets should be used, but the use and occupation of so much of the streets of cities as may be reasonably needed for the construction and maintenance of telegraph poles and telegraph lines *is expressly authorized without compensation* to the state or to the cities, municipal subdivisions of the state. * * *" *Hodges* v. *Western Union Tel. Co.*, 72 Miss. at 913-914, 18 So. at 84 (Emphasis supplied).

It is clear that the language in the *St. Louis* case which is relied upon by appellant has been discredited as a statement of principle, and has lost any weight as authority by reason of many subsequent decisions of this Court (See cases listed p. 8, *supra*). The fact is that in decision after decision, rendered subsequent thereto, this Court and many other courts, have clearly, unmistakably and repeatedly announced the rule that state grants to utilities inviting them to use streets and highways with their facilities are not mere revocable permits but constitute offers which, when accepted as here, result in irrevocable contracts and property rights

The courts below have adhered to the principles laid down in *Russell* v. *Sebastian*. In *Sebastian*, this Court reversed the California Supreme Court. The California Supreme Court had relied upon the decision in the *St. Louis* case and held that the utility's rights were confined to the streets occupied prior to the revision of the state grant. *Ex parte Russell*, 163 Cal. 668, 126 Pac. 875, 879 (1912). When the *Sebastian* case reached this Court, counsel for the City again relied upon the language from the *St. Louis* decision which the appellant has here seized upon.[4]

In *Sebastian* the Court emphatically rejected the identical contention which appellant is here trying to make.

The decision in *Russell* v. *Sebastian* held:

> (1) That the grant, resulting from the acceptance of the state's offer, constituted a protected contract and property right, and not a mere revocable license: and
>
> (2) That the scope of the grant is not to be measured by the use and occupancy of streets at any given time, but rather by the breadth of undertaking invited and encouraged by the grant.

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4. See summary of City's brief at pages 917-918 of 58 L. Ed.

Since the decision in the *Sebastian* case, this Court has consistently applied the principles announced therein. Since the decision in the *Sebastian* case there is no decision of any court contrary to the decision of the Court of Appeals in the present case.

The contention of appellant (Page 7, Statement as to Jurisdiction), that Chapter 38, Mississippi Laws of 1886 is itself violative of the equal protection clause of the Fourteenth Amendment is plainly unsubstantial. See *Los Angeles County* v. *Southern California Telephone Company*, 32 Cal. 2d 378, 196 P. 2d 773 (1948), appeal dismissed for want of a substantial federal question, 336 U.S. 929, 93 L. Ed. 1090, 69 S. Ct. 737 (1949).

## CONCLUSION

We respectfully submit that the appeal should be dismissed, or in the alternative, that the case should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Charles B. Snow, attorney of record for appellee, hereby certify that I have this day mailed to Honorable Thomas Y. Minniece and Honorable Lester E. Wills, attorneys for appellant, both of Meridian, Mississippi, a true and correct copy of the above brief.

This ..... day of December, 1958.

.....

CHARLES B. SNOW.

FILE COPY

Office-Supreme Court, U.S.
JAMES R. BROWNING, Clerk

# IN THE SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1958

## No. 546

CITY OF MERIDIAN
DEFENDANT—APPELLANT

*v.*

SOUTHERN BELL TELEPHONE AND
TELEGRAPH COMPANY
PLANTIFF—APPELLEE

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

# BRIEF OF APPELLANT OPPOSING MOTION TO DISMISS AND/OR AFFIRM

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CITY OF MERIDIAN
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APPEAL FROM THE UNITED STATES COURT OF APPEALS
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## BRIEF OF APPELLANT OPPOSING MOTION TO DISMISS AND/OR AFFIRM

The Appellant, pursuant to United States Supreme Court Rule 16 (c) 3, files this its brief opposing Appellee's Motion to Dismiss and/or Affirm. Appellee's motion was received by counsel for Appellant on December 24, 1958.

### STATEMENT OF THE CASE

This case has already been stated in our Statement as to Jurisdiction (pp. 8-15) and Appellee's Motion (pp. 2-5).

## ARGUMENT

Appellee sets out two grounds for argument in its motion and brief:

I. This case is not reviewable by appeal.

II. The decision below is clearly correct.

Appellant will take up these arguments in the order set out by Appellee, taking the converse position in each case.

### I. THIS CASE IS REVIEWABLE BY APPEAL

Counsel's argument under this point is based on the fact that they raised the question in the lower courts that the charge sought to be made for their use of city streets violated the contract clause of the state constitution as well as of the federal constitution. An examination of the opinions of the District and Circuit Courts, (which contain the Courts' language as to its finding and not counsel's) however, will reveal that this case was decided on the basis that the attempt to charge Appellee for use of city streets violated the federal constitution. Both of these opinions are set out in full on pages 13-27 and 1-12 of the Appendix to Statement as to Jurisdiction herein. Although both the District and Circuit Courts recognized that Appellee was also relying on the state constitution, both Courts refrained from discussing the state constitution, but put the basis of their adjudication squarely on the protection of the federal constitution. At the outset the District Judge made the following statement:

"The principal question for solution is whether

or not an irrevocable franchise was granted . . . and whether or not the telephone company accepted that grant so as to constitute a contract protected *by the federal constitution.*" (Italics ours). (Appendix to Statement as to Jurisdiction, p. 13).

The learned District Judge said further:

> "The authorities are unanimous that it is a binding contract and to change its terms would be to impair the obligations of a contract and conflict with the *U. S. Constitution.*" (Italics ours) (Appendix to Statement as to Jurisdiction, p. 20).

In his concluding paragraph as to the rights originally created, the District Judge summed up his finding as follows:

> "Under the stipulation and documents offered in evidence it is clear that the Act of 1956 by the Mississippi State Legislature, if it undertakes to authorize a municipality to impose the charges, is beyond the power of the Legislature and would conflict with *the Constitution of the United States.*" (Italics ours) (Appendix to Statement as to Jurisdiction, p. 23)

In his opinion the learned District Judge recognized that the state courts had held previously that the Mississippi Statute gave only a revocable license and not a contract protected by either the state or federal constitution. Referring to the adjudication of the Supreme Court of Mississippi in *Hodges v. Western Union Telegraph Company,* 72 Miss. 910, 18 So. 84, the District Judge said:

> "It further held that the Act was a license to the

company to use the streets, *but was revocable at the will of the legislature.*" (Italics ours) (Appendix to Statement as to Jurisdiction, p. 20).

Other than an attempt to distinguish *Memphis v. Postal Telegraph and Cable Company*, 145 Fed. 602, and a short discussion of *Hodges* and another Mississippi case, the Circuit Court's opinion was confined to a statement of the contentions and the approval of the "thoughtful and thorough opinion" of the District Judge. In its discussion of the Mississippi cases, although the Circuit Court did not fully concur with the District Judge in his view that *Hodges* adjudicated that the permission was revocable at the will of the legislature, it pretermitted any decision as to the state law on the subject, stating:

> "For, *under the federal decisions cited and relied on by the Court below*, the offer of the statute when accepted became a contract beyond the reach of impairment by either legislative or judicial action and any decision of the Mississippi Supreme Court *must yield to the decisions of the Supreme Court of the United States to the contrary.*" (Italics ours) (Appendix to Statement as to Jurisdiction, p. 10)

The decision of the Supreme Court of Mississippi in *Hodges* determined the nature of Appellee's right under the statute in question insofar as the state law is concerned. It was there necessary for the Court to make a determination of the telephone company's rights in order to then determine whether or not they could be charged at that time. Therefore, the holding that the right obtained was a revocable permit, even though it had not been revoked at that time, was a statement of the law of Mississippi under

the rule of stare decisis, even though it is not res judicata insofar as the case at bar is concerned. It was, therefore, necessary for the District and Circuit Courts to place the basis of their decision on the federal question involved which, as shown hereinbefore, they did.

We submit further that counsel seeks to place too narrow a construction on 28 U. S. C., Section 1254 (2) and one which has never been recognized by this Court. The case cited by counsel (*U. S. v. Hastings*, 296 U. S. 188, 193; 80 L. Ed. 148, 150, 151; 56 S. Ct. 218) supports the position of Appellant rather than Appellee. That case involved an appeal by the government under U. S. C. A., Title 18, Section 682 (Criminal Appeals Act) as it read in 1935. Under the statute such appeals were confined to cases in which demurrers were sustained based upon the invalidity or construction of the statute upon which the indictment was founded. The Court held that the appeal was proper unless a *wholly independent* ground was the foundation of the judgment. The reason given by the Court was that if wholly independent grounds of insufficiency existed, the judgment of the District Court would remain in effect and the appeal would only amount to an expression of an abstract opinion, which might or might not fit a subsequent prosecution. In the case at bar, it cannot be said that the judgment below rests on any independent basis which would make the decision of this Court only an abstract opinion. A decision by this Court that Appellee does or does not now hold a contract by virtue of the state statute, which is protected by the federal constitution, will finally determine the rights of the parties here, regardless of the state constitution or its interpretation by the state courts.

The appeal statute relied on here clearly states that a

party has a right to appeal who relies on a state statute which has been held by a Court of Appeals to be invalid as repugnant to the Constitution of the United States. That is clearly the case before this Court. Appellant is relying on Section 5 (e) of Chapter 372 of the Mississippi Laws of 1956 (Statement as to Jurisdiction, pp. 2-3). This state statute has been held invalid as repugnant to the Constitution of the United States. The limitation that the appeal shall be restricted to the federal questions presents no problem here because there exists no independnt basis for any opinion othr than one based on a decision of the federal questions presented.

Within the last year this Court held that an appeal was proper where it was charged that a state tax discriminated against the federal government, even though it was necessary for the Court to determine that under the state law the nature of the tax was such as not to impose a tax on government property. *Detroit v. Murray* Corporation, 355 U. S. 489, 2 L. Ed. (2d) 441, 78 S. Ct. 458.

This decision further demonstrates that this Court will not engage in such legalistic hair splitting with reference to its jurisdiction as counsel for Appelle urges. In *Detroit* the Appellant appealed and then filed a petition for certiorari in the face of the statutory provision (U. S. C. Title 28, Section 1254 (2)) precluding the filing of such petition, after an appeal had been taken. The Court very properly took the liberal view that a proper case was presented to it for decision and took jurisdiction under both the appeal and the petition for certiorari. The statutes require consideration by this Court as if on a petition for certiorari in certain appeal cases. Even if we are mistaken in our contention that this is a proper case for appeal, certainly, under its broad

judicial powers, this Court can consider the question here as though presented by certiorari. After all, under the present rules of the Court, there is very little, if any, substantial difference in the two methods of review.

Counsel have overlooked question 1d set out on page 7 of our Statement as to Jurisdiction. This question is whether or not the state statute relied on by Appellee was itself a violation of the Fourteenth Amendment of the United States Constitution. It is sufficient alone to give this Court jurisdiction of this appeal. On that issue there is no question of state law whatsoever.

If we are mistaken, however, in our contention that this Court has jurisdiction to hear the case on this appeal, because there is a state question involved; then the proper procedure is, not to dismiss this appeal, but to reverse this cause and remand it to the District Court with directions to retain the bill pending a determination of proceedings to be brought with reasonable promptness in the State Court. *Railroad Commission v. Pullman Company*, 312 U. S. 496, 85 L. Ed. 971. The Federal Courts, in the exercise of their discretionary powers as courts of equity, will refrain from the unnecessary decision of constitutional questions to enable the parties to litigate first in the State Courts, questions of State law, decision of which is preliminary to, and may render unnecessary decision of the constitutional questions presented. *Merideth v. City of Winter Haven*, 320 U. S. 228, 236; 64 S. Ct. 7, 12. If counsel is right that there is still a question of state law preliminary to the decision of the federal question, which may render unnecessary a decision on the federal question presented, then certainly this is a case in which proceedings should be stayed until the parties have litigated the state

question in the State Courts.

This principle is particularly applicable to a case involving a declaratory judgment concerning the revenue of a state or its political subdivisions as is true of the case at bar. *Great Lakes Dredge and Dock Company v. Huffman*, 319 U. S. 293; 63 S. Ct. 1070; 87 L. Ed. 1407.

In the case at bar, there is no doubt about the ability of Appellee to get a quick adjudication of the state law in the state courts. Appellee can simply file a bill in the state courts to quiet its title to the perpetual easement claimed by it, or the issue may be settled by appropriate action on the part of Appellant to enforce the payment claimed by it. *Railroad Commission v. Pullman Company*, supra.

## II. THE DECISION BELOW IS NOT CORRECT

Appellee's second point is that the decision below is clearly correct. This is, of course, a question to be briefed and argued fully after this Court takes jurisdiction of the case. However, as pointed out in our Statement as to Jurisdiction, the decision of the Court below is clearly in conflict with *St. Louis v Western Union Telegraph Company*, 149 U. S. 465; *Memphis v. Postal Telegraph and Cable Company*, 139 Fed. 707, 145 Fed. 602; and *Bankers Trust Company v. Rator*, (1922) 258 U. S. 328.

A comparison of the language of the Missouri statute construed in the *St. Louis* case and of the statute relied on by Appellee here, insofar as it purports to grant an easement, will show that they are almost identical. So that the Court may see more easily, we quote the applicable language of the two statutes side by side:

**Missouri Statute**

(Appendix to Statement as to Jurisdiction p. 51)

"Any company incorporated for the purpose may construct lines of electric telegraph upon and along any of the highways and public roads and across any of the waters within the limits of this state by erection of the necessary fixtures, including posts, piers or abutments for sustaining the wires of such lines."

**Mississippi Statute**

(Appendix to Statement as to Jurisdiction p. 28)

"Any telegraph or telephone company chartered or incorporated by the laws of this or any other state of the United States shall . . . have the right to construct, maintain and operate telegraph or telephone lines through any public lands of this state and on, across and along all highways, streets and roads and across and under any navigable waters . . ."

In the *St. Louis* case the telegraph company made the same contentions as the telephone company makes here. This Court pointed out (149 U. S. 465, at p. 470) that the 1855 Act had been superseded just as it has in the case at bar. *A. & V. Railway Co. v. Cumberland Telephone and Telegraph Co.*, 88 Miss. 438, 41 So. 258. When the telegraph company made the contention that it had acquired vested rights under the 1855 Act by occupying streets, this Court said: "It was only a permission, a license, which might be revoked at any time and, further, whatever rights, if any, this defendant may have acquired to continue to use the streets already occupied at the time of the revision of 1866, *it cannot with any show of reason be contended that it received an irrevocable power to traverse the state and occupy any other streets and highways.*" (Italics ours) In the case at bar, it has been held that the telephone company, by virtue of their occupancy prior to repeal of the Mississippi Statute, can now use not only streets occupied by them prior to such repeal, but also other streets then in existence and those which may be built in the future, and they can never be charged for such use. We submit that this is in direct conflict with the opinion of this Court in the *St. Louis* case.

It is also in direct conflict with *Memphis v. Postal Telegraph and Cable Company*, supra. As pointed out in our Statement as to Jurisdiction (p. 18), the Court of Appeals has overruled the *St. Louis* case by implication and in attempting to distinguish the *Memphis* case, entirely overlooked the decision in the District Court showing clearly that the statute relied on by the telegraph company, just as in the *St. Louis* case, antedated any grant to the city.

As shown hereinbefore, and in our Statement as to Jurisdiction (p. 14), the Supreme Court of Mississippi in construing the Mississippi Statute, followed the decision of this Court in *St. Louis* holding that the statute granted a revocable license only. *Hodges v. Western Union Telegraph Company*, 72 Miss. 910.

Counsel for Appellee virtually admit (Motion p. 12) that the decision of this Court in the *St. Louis* case was impliedly overruled by the Court of Appeals, arguing that it has lost weight as authority by subsequent decisions of this Court, even though it has never been overruled. Counsel cite a number of cases involving telephone and other franchises. The cases cited from this Court, with one exception, are prior to *Postal Telegraph Company v. Richmond*, 249 U. S. 252 which cites *St. Louis* with approval. We will not now burden this Court with an attempt to distinguish each case cited individually, although study of each case will convince the Court that they are distinguishable. Those cases fall generally into three classes.

1. Those involving a deliberate grant of a franchise by municipal ordinance.

2. Those involving the grant of corporate charters conferring specific rights.

3. Those involving a deliberate grant by the State of certain franchise rights to those qualified who will take advantage of the state statute.

Only those cases arising under the third catagory could have any application to the *St. Louis* case. Of that group only *Russell v. Sebastian*, 233 U. S. 195 was from this Court. That decision is not contrary to the *St. Louis* decision because the language of the two acts construed was different. This Court in *Sebastian* pointed out a long legislative and judicial history in California evidencing the fact that an irrevocable grant was intended. Indeed, it was not contended otherwise. Where, as here, the bare language of the act itself must be relied upon, *St. Louis* governs. The legislative and judicial history of the Mississippi statute shows clearly no such irrevocable grant was intended. *Hodges v. Western Union Telegraph Co.*, supra; *Wilmut v. Covington County*, 221 Miss. 613, 71 So. 2d 184. (As to legislative history, see Statement as to Jurisdiction, pp. 10-11).

The fact that this Court, as counsel say, (Motion p. 12), considered but did not overrule *St. Louis*, indicates they did not think the two statutes comparable. If *Sebastian* limits *St. Louis* in any way, it could only be in determining that, under the particular California statute, the measure of their rights was not streets occupied, but territory contemplated in their original construction. If that test is applied here, Appellee would be put to proof that it built prior to 1890 for service to the present city. This they have not shown and cannot show.

If *St. Louis* and *Sebastian* are in conflict, then this Court can now choose to follow whichever case it deems to be correct. We submit that *Sebastian* was decided during that

period in our jurisprudence in which so many vested rights of public utilities and other private corporations were upheld, that a great body of that jurisprudence has been since repudiated. We have no hesitancy in asserting that *St. Louis* is more in accord with modern laws and judicial decisions concerning utilities.

The *Memphis* case is the only decision involving the right to charge for the use of streets under such a statute as is here involved. In that case, the Sixth Circuit held that the charge was valid. The Fifth Circuit has now held to the contrary. Counsel seek to further distinguish the case on the basis that the statute had not been previously construed by the Tennessee Supreme Court as has our statute. However, in making this argument they seek to run with the hare and the hounds. If the state rather than the Federal interpretation of similar statutes is to be accepted, then it must be accepted in full. Although, in *Hodges*, the Mississippi Court denied the right to charge, it did so on the basis that a *revocable* permit *then* stood unrevoked.

Counsel in their Motion (p. 9-10) seek to do that which neither of the lower Courts attempted to do; that is, distinguish the case of *Bankers Trust Company v. Raton*, supra. The rule of law as to estoppel set out in the *Raton* case is exactly applicable to the case at bar, but apparently was not considered by either lower Court. We submit that the distinction counsel attempts to make is not valid. In the *Raton* case the water company claimed it was operating under authority of a statewide grant such as Appellee claims here. However, it was shown that it had accepted a grant from the City limiting the franchise to twenty-five years. In the case at bar, Appellee claims it was operating under the statewide grant (Motion p. 10). It also accepted a fran-



chise from the City limited to a period of thirty years and requiring other considerations from the telephone company not called for by the statewide grant. (R. pp. 93-97). This Court held in the *Raton* case that the acceptance of the limited franchise from the City estopped it to clam under the state grant. We submit that the same principle of law is applicable to the case at bar. Counsel's distinction that the New Mexico courts had previously decided that the water company held under its grant from the City is not sufficient to distinguish this case from the *Raton* case. That was clearly not the basis of this Court's decision in *Raton*. It was only mentioned to show that the City had authority to grant the franchise. In the case at bar, the right of the City to grant the franchise is beyond question. The principle of estoppel is the same in both cases. A company which seeks and obtains a franchise from a City for its own advantage is estopped to deny that its rights are limited by the terms of the franchise which it sought and obtained. This principle is all the more applicable to the case at bar because the franchise was sought and obtained at a time during which the right of Appellee's predecessor to occupy the city streets was in litigation.

Counsel has not even attempted to answer our questions 2, 3, or 4 (Statement as to Jurisdiction, pp. 7-8). We will not attempt to burden the Court at this time by an argument on the merits, but simply refer the Court to the cases of *Commonwealth v. Warwick*, 185 Pa. St. 323, 40 Atl. 93; *Thomas v. West Jersey Railroad Company*, 101 U. S. 71; *Oregon Railway Company v. Oregonian Railway Co.*, 130 U. S. 1; *St. Clair County Turnpike Company v. Illinois*, 96 U. S. 63, as examples of authority showing that there is substance to the other points raised on the merits of this case.

As to our contention with reference to the equal protection clause of the Fourteenth Amendment, referred to by counsel in their Motion (p. 13), we submit that the case of *Los Angeles County v. Southern Calif. Telephone Company*, 32 Cal. 2d 378, 196 Pac. 2d 773, cited by them, does not overrule the decision of this Court in *Frost v. Corporation Commission*, 278 U. S. 515, which is applicable to the statute involved in the case at bar.

## CONCLUSION

WHEREFORE, it is respectfully submitted that this Court has jurisdiction of this appeal and that, unless it should see fit to reverse and remand for dismissal of the bill of complaint, it should assume jurisdiction and reaffirm the true holdings of its former decisions.

If mistaken in our contention that this Court has jurisdiction of this appeal because there is yet some state question undecided, then this Court should reverse this cause and remand it to the District Court with directions to retain the bill pending a determination of proceedings to be brought with reasonable promptness in the State Court.

Respectfully submitted,

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THOMAS Y. MINNIECE
Lamar Building
Meridian, Mississippi

LESTER E. WILLS
Box 566
Meridian, Mississippi

ATTORNEYS FOR APPELLANT

## CERTIFICATE

I, the undersigned Lester E. Wills, one of the attorneys for Appellant herein, hereby certify that I have served the foregoing Brief of Appellant Opposing Motion to Dismiss and/or Affirm upon Mr. Charles B. Snow, Milner Building, Jackson, Mississippi, Mr. O. Winston Cameron, Threefoot Building, Meridian, Mississippi, and Mr. John A. Boykin, Attorney, Southern Bell Telephone and Telegraph Company, Atlanta, Georgia, my mailing to each of them a true copy of said Brief of Appellant Opposing Motion to Dismiss and/or Affirm.

Witness my signature this the day of January, 1959.

.....

Lester E. Wills
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FILE COPY

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JAMES R. BROWNING, Clerk

# IN THE SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1958

## No. 546

CITY OF MERIDIAN
APPELLANT

*v.*

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY
APPELLEE

# MOTION OF APPELLANT TO REVERSE AND REMAND FOR DETERMINATION BY THREE-JUDGE DISTRICT COURT

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# IN THE SUPREME COURT OF THE UNITED STATES

## No. 546

CITY OF MERIDIAN
APPELLANT

*v.*

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY
APPELLEE

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

### MOTION OF APPELLANT TO REVERSE AND REMAND FOR DETERMINATION BY THREE-JUDGE DISTRICT COURT

Comes the Appellant, the City of Meridian, Mississippi, and moves the Court to assume jurisdiction of this Appeal under its power to superintend and control; and thereupon to reverse and vacate the judgment of the Court of Appeals for the Fifth Circuit entered by said Court on the 9th day of June, 1958, and to order the remand of the action to the District Court for the Southern District of Mississippi, with directions to vacate the final judgment of said District Court, for determination by a District Court of three judges to be organized under 28 U. S. Code, Chapter

155, Sections 2281 and 2284; and in support of said motion, Appellant shows the following, to wit:

I.

Article XIV of the Complaint herein (original record page 11, et seq.) contains the following allegations:

> "There is an actual controversy between the plaintiff and the defendant. The City of Meridian is presently demanding that plaintiff pay to it two per cent (2%) of its monthly service charges in the City of Meridian and is asserting a right to collect said sum based upon the interpretation of House Bill No. 123 adopted by said City of Meridian. Plaintiff has denied any obligation or liability on its part to make such payment, and has refused to make any such payments. Under these circumstances, it is essential that the plaintiff obtain a construction of this statute and a determination and declaration as to its construction and validity, for the plaintiff cannot otherwise ascertain its rights or liabilities. In the absence of such determination and declaration, the rights of the plaintiff in the premises might be held indefinitely in suspension to the great prejudices of plaintiff.
>
> "Plaintiff avers, upon information and belief, that unless declaratory relief is granted by this Court, plaintiff will be subjected to a multiplicity of suits by various municipalities seeking to enforce collection of a percentage of its revenues from the plaintiff.
>
> "Plaintiff has no other adequate, efficient and

speedy remedy, and unless declaratory relief is granted by this Court, plaintiff cannot otherwise have its rights to use and occupy the streets of the City of Meridian adjudicated unless and until the defendant takes the initiative and files suit against plaintiff.

"Plaintiff further alleges that it is a regulated public utility which has no source of revenues other than its customers and subscribers. As such utility it is plaintiff's duty to pay all charges which it is legally obligated to pay, and not to pay any charges that it is not legally obligated to pay. Any charge imposed upon plaintiff in favor of municipalities for the use of the streets therein ultimately would have to be passed on to and borne by the rate-paying public. In fixing the rates and charges presently in force and effect for telephone service, no provision was made for the payment of any percentage of plaintiff's revenues to municipalities as compensation for the use of the streets, and such charge was not taken into consideration in fixing said rates and charges. Plaintiff's rates and charges which are now in force and effect do not allow any leeway whatsoever to the plaintiff with respect to any increases which might occur in its operating costs. It is apparent, therefore, that if plaintiff is to be required to pay this charge to defendant and other municipalities, it will be imperative that the plaintiff receive additional revenues so that plaintiff may recoup the cost of such payment. If it could be finally determined that plaintiff is required to make said payment, no relief would or could be legally or otherwise afforded to it as to

any increased revenues it was entitled to demand and collect from its patrons pending and prior to the date of such determination, and all such needed additional revenues would be wholly and irretrievlost to it. It is, therefore, imperative and essential that plaintiff obtain an immediate declaration as to its rights and liabilities in the premises."

II.

While said Complaint nowhere alleges in so many words that if Plaintiff is not granted the relief demanded therein it will suffer irreparable injury, the facts alleged in Article XIV, quoted above, sustained the legal conclusion that if Appellant and other municipalities within the State of Mississippi should be permitted to pursue their remedies at law and collect the two percent (2%) of the service charges allowed to them by House Bill Number 123 of the 1956 Regular Session of the Legislature of the State of Mississippi, Appellee would be without remedy, either at law or in equity, to recover back the sums paid by it, or the cost of defending a multiplicity of suits, so that the expenses incurred and money paid would be lost to Appellee, thus causing irreparable injury.

III.

While said Complaint does not pray or make demand for the issuance of an injunction, under the Rules of Civil Procedure and specifically under Rule 54 (c), United States District Courts are under the duty to grant the relief to which the parties are entitled, even if the party thus to be relieved has not demanded such relief in his pleading; and, therefore, in the instant case, if the Plaintiff, Appellee here, had been entitled to relief, it would have been entitled to an injunction to restrain and prevent the collection of the

(2%) of the gross revenues collected by it, as authorized by House Bill Number 123. This action was brought solely for the purpose of having a law of the State of Mississippi declared unconstitutional. Such declaration would be of no effect in law or equity, except as the basis for an injunction and the ultimate relief sought by Appellee is available in no other way. A District Court of the United States has jurisdiction to enjoin the enforcement of a state statute upon the ground of its unconstitutionality only as authorized and directed by 28 U. S. C. 2281. Such Court must be organized pursuant to 28 U. S. C. Section 2284. See *Federal Housing Administration v. The Darlington, Inc.*, No 13 this term, decided Nov. 24, 1958, U. S. , 3 L. Ed. 2d 132, 79 S. Ct. 141 and 352 U. S. 977, 1 L. Ed. 2d 363, 77 S. Ct. 381.

Wherefore, Appellant respectfully submits that the Courts below were without jurisdiction of this Civil Action, and that on this Appeal, this Court should exercise its powers of superintending control and the judgments of the lower Courts should be vacated and the cause should be remanded, for determination by a District Court of three Judges.

Respectfully submitted,

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Meridian, Mississippi

ATTORNEYS FOR APPELLANT

## CERTIFICATE

I, the undersigned Lester E. Wills, one of the attorneys for Appellant herein, hereby certify that I have served the foregoing Motion upon Mr. Charles B. Snow, Milner Bldg., Jackson, Mississippi, Mr. O. Winston Cameron, Threefoot Building, Meridian, Mississippi, and Mr. John A. Boykin, Attorney, Southern Bell Telephone and Telegraph Company, Atlanta, Georgia, by mailing to each of them a true copy of said Motion.

Witness my signature this the day of January, 1959.

.....

Lester E. Wills
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# IN THE SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1958

## No. 546

CITY OF MERIDIAN
DEFENDANT—APPELLANT

*v.*

SOUTHERN BELL TELEPHONE AND
TELEGRAPH COMPANY
PLANTIFF—APPELLEE

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

# BRIEF AMICI CURIAE OF THE CITY OF GULFPORT, THE CITY OF BILOXI, THE CITY OF McCOMB, AND THE TOWN OF QUITMAN

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# IN THE SUPREME COURT OF THE UNITED STATES

## No. 546

CITY OF MERIDIAN
DEFENDANT—APPELLANT

*v.*

SOUTHERN BELL TELEPHONE AND
TELEGRAPH COMPANY
PLANTIFF—APPELLEE

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## BRIEF AMICI CURIAE OF THE CITY OF GULFPORT, THE CITY OF BILOXI, THE CITY OF McCOMB, AND THE TOWN OF QUITMAN

### INTEREST OF AMICI CURIAE

The cities and town filing this Amici Curiae Brief are representative of the larger, medium sized and smaller municipalities of the 266 municipal corporations of the State of Mississippi. Although not parties to this suit, they, as well as all of the other municipal corporations of the State of Mississippi, are interested in the decision in this case by virtue of the fact that each contends that it is entitled to

collect the 2% charge provided for by Chapter 372 of the Mississippi Laws of 1956 (Mississippi Code of 1942, Section 7716-05(e)). The City of Gulfport actually has a case now pending in the Chancery Court of Harrison County, Mississippi, to discover the amount of such charge due it by Plaintiff-Appellee here, said case being Cause No. 40667 in the Chancery Court of Harrison County, Mississippi. Almost all of the 266 municipal corporations of the State of Mississippi have expressed their interest in this suit by providing legal assistance to The City of Meridian through the Mississippi Municipal Association. (R. p. 285) Pursuant to Rule 42 (4) this brief is filed by four representative municipal corporations, all being political subdivisions of the State of Mississippi, and this brief is sponsored by their authorized law officers.

## ARGUMENT

The reasons why this case is reviewable by appeal and why the decision below is incorrect have been clearly set out in the Statement as to Jurisdiction and Brief of Apellant Opposing Motion to Dismiss and/or Affirm herein. Our argument will be addressed to the sole proposition that, if, for any reason, this Court should determine that there is still a state question to be decided, then Appellee is not entitled to a dismissal of this appeal, but it is the duty of this Court to postpone a decision on the question of jurisdiction until the state question has been determined in the State Court, or to reverse this cause and remand it to the District Court with directions to retain the bill, pending determination of the state question.

In *Merideth v. City of Winter Haven*, 320 U. S. 228, 236; 64 S. Ct. 7, 12, this Court made the following statement:

"So too a federal court, adhering to the salutary

policy of refraining from the unnecessary decision of constitutional questions, may stay proceedings before it, to enable the parties to litigate first in the state courts questions of state law, decision of which is preliminary to, and may render unnecessary, decision of the constitutional questions presented. Railroad Commission v. Pullman Co., 312 U. S. 496, 61 S. Ct. 643, 85 L. Ed. 971; cf. Thompson v. Magnolia Petroleum Co., 309. U. S. 478, 60 S. Ct. 628, 84 L. Ed. 876. *It is the court's duty to do so when a suit is pending in the state courts*, where the state questions can be conveniently and authoritatively answered, at least where the parties to the federal court action are not strangers to the state action. City of Chicago v. Fieldcrest Dairies, 316 U. S. 168, 62 S. Ct. 986, 86 L. Ed. 1355." (Italics ours)

As stated hereinbefore, a suit is now pending in the Chancery Court of Harrison County, Mississippi, a court of record in the State of Mississippi, seeking an accounting from Appellee as to the exact amount owed The City of Gulfport by Appellee under said Chapter 372 of the Mississippi Laws of 1956, and payment of such amount to The City of Gulfport. Appellee here is not a stranger to that action, but is a party thereto. If there is a state question still involved in this case, such question can be conveniently and authoritatively answered in such suit. Since the 2% charge is not being paid by Appellee, it will not be prejudiced by any delay involved.

In the exercise of its supervisory appellate power this Court can make such disposition of the case as justice requires. It can either reverse and remand to the District

Court with the direction to retain the bill, pending the determination of the state question, or can simply postpone the determination of its own jurisdiction pending a determination of the state question. This Court's supervisory appellate power in such cases is set out clearly in *Walling v. Reuter*, 321 U. S. 671; 64 S. Ct. 826, 88 L. Ed. 1001. In that case the Court said (321 U. S. 676-677; 64 S. Ct. 829):

> "It is a familiar practice of this Court that where for any reason the Court may not properly proceed with a case brought to it on appeal, or where for any reason it is without power to proceed with the appeal, it may nevertheless, in the exercise of its supervisory appellate power, make such disposition of the case as justice requires. When events subsequent to an appeal may affect the correctness of the judgment appealed from, this Court may vacate the judgment and remand the cause for furthe. proceedings. State of Missouri ex rel. Wabash R. Co. v. Public Service Comm., 273 U. S. 126, 131, 47 S. Ct. 311, 313, 71 L. Ed. 575; Patterson v. State of Alabama, 294 U. S. 600, 607, 55 S. Ct. 575, 578, 79 L. Ed. 1082 and cases cited; Villa v. Van Schaick, 299 U. S. 152, 155, 156, 57 S. Ct. 128, 129, 81 L. Ed. 91. When it is without jurisdiction to decide an appeal which should have been prosecuted to another court, it may vacate the Judgment and remand the cause in order to enable the court below to enter a new judgment from which a proper appeal may be taken. Gully v. Interstate Natural Gas Co., 292 U. S. 16, 54 S. Ct. 565, 78 L. Ed. 1088; Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., 292 U. S. 386, 392, 54 S. Ct. 732, 735, 78 L. Ed. 1318; Jameson & Co. v.

Morgenthau, 307 U. S. 171, 174, 59 S. Ct. 804, 805, 83 L. E. 1189; Phillips v. United States, 312 U. S. 246, 254, 61 S. Ct. 480, 484, 85 L. Ed. 800."

In the *Walling* case this Court refused to consider the case on the merits because it appeared that further proceedings in the District Court were in order. The judgment of the Court of Appeals was vacated without the consideration of the merits of the case. In the case at bar if there is a state question to be determined, it would appear that the most expeditious procedure would be for this Court to postpone the question of its jurisdiction pending a decision of the state question.

## CONCLUSION

We, therefore, respectfully submit that, if there is sitll a question of state law to be decided, then it would be the duty of this Court to postpone a decision as to its jurisdiction or to reverse this cause and remand it to the District Court with directions to retain the bill, pending a determination of the state question in the proceedings in state court.

Respectfully submitted,

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CERTIFICATE

I, the undersigned Tally D. Riddell, one of the attorneys for the Amici Curiae herein, and a member of the bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Brief of Amici Curiae herein, upon Mr. Charles B. Snow, Milner Building, Jackson, Mississippi, Mr. O. Winston Cameron, Threefoot Building, Meridian, Mississippi, and Mr. John A. Boykin, Attorney, Southern Bell Telephone and Telegraph Company, Atlanta, Georgia, by mailing each of them a true copy of said Brief of Amici Curiae.

Witness my signature this the day of January, 1959.

.....

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JAMES R. BROWNING, Clerk

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

## No. 546.

CITY OF MERIDIAN,
*Defendant-Appellant,*

vs.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, *Plaintiff-Appellee.*

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

## BRIEF OF APPELLEE IN OPPOSITION TO MOTION OF APPELLANT TO REVERSE AND REMAND FOR DETERMINATION BY THREE-JUDGE DISTRICT COURT AND TO BRIEF AMICI CURIAE.

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

## No. 546.

CITY OF MERIDIAN,
*Defendant-Appellant,*

vs.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, *Plaintiff-Appellee.*

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

## BRIEF OF APPELLEE IN OPPOSITION TO MOTION OF APPELLANT TO REVERSE AND REMAND FOR DETERMINATION BY THREE-JUDGE DISTRICT COURT AND TO BRIEF AMICI CURIAE.

I.

Appellant has filed a motion to reverse and remand the case for determination by a three-judge district court. The motion is based on the false premise that this case involves the granting of an injunction restraining the enforce-

ment, operation or execution of a State statute, and that under 28 U.S.C., Section 2281, such an injunction cannot be granted unless the application is heard and determined by a district court of three judges.

We submit that appellant's motion is not authorized by the Rules of this Court. Further, and in any event, an examination of the statute invoked by appellant will readily reveal that there is no merit to the motion.

28 U.S.C., Section 2281, provides in substance that an interlocutory or permanent injunction restraining the enforcement, operation or execution of a State statute shall not be granted by any district court or judge upon the ground of unconstitutionality unless the application is heard and determined by a district court of three judges organized under 28 U.S.C., Section 2284.

The short answer to appellant's motion is that in the present case, no injunction whatsoever, either interlocutory or permanent, was sought by appellee or granted by the Court. No order whatsoever has been issued restraining the action of any officer of the State, or restraining the enforcement, operation or execution of a State statute.

An examination of Section 2281, and forerunner statutes, clearly reveals that the requirement of a three-judge court applies only where an application for an injunction is made and pressed to a hearing.

The fact that the complaint presents a case in which an injunction might have been applied for is immaterial. Cf. *Stratton* v. *St. Louis Southwestern Railway Co.*, 282 U.S. 10, 15, 75 L. Ed. 135, 138; *Moore* v. *Fidelity & Deposit Company*, 272 U.S. 317, 320, 71 L. Ed. 273, 278; *Smith* v. *Wilson*, 273 U.S. 388, 391, 71 L. Ed. 699, 700.

While the *Stratton, Moore* and *Smith* cases dealt primarily with interlocutory injunctions, as a matter of logic and principle, the reasoning therein likewise applies to permanent injunctions.

The plaintiff has an election. If no injunction whatsoever is sought or granted, the statutory requirement of a three-judge district court does not apply.

A distinctive characteristic of a declaratory judgment is that the declaration of rights stands by itself, and no executory or coercive process follows as of course. In other words, a declaratory judgment does not necessarily involve executory or coercive relief. A prayer for relief by injunction is not a prerequisite to the exercise of judicial power. *Nashville, Chattanooga & St. Louis Railway* v. *Wallace*, 288 U.S. 249, 263, 77 L. Ed. 730, 735, 736; *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 241, 81 L. Ed. 617, 622.

Thus, it is not necessary to the exercise of the judicial power in a declaratory judgment proceeding that an injunction be sought. If the plaintiff, as was the plaintiff here, is content with a mere declaration of his rights as provided by the statute (28 U.S.C., Sec. 2201), he is not required to seek a coercive judgment or injunction. *Stephenson* v. *Equitable Life Insurance Society*, (C.A. 4th, 1937) 92 F. 2d 406, 409. Cf. *Gully* v. *Interstate Natural Gas Co.*, (C.A. 5, 1936) 82 F. 2d 145, 149, Certiorari denied 298 U.S. 688, 80 L. Ed. 1407, 56 S. Ct. 958; *Mississippi Power and Light Company* v. *City of Jackson*, (C.A. 5, 1941) 116 F. 2d 924, 926, Certiorari denied 312 U.S. 698, 85 L. Ed. 1133, 61 S. Ct. 741.

The foregoing conclusions are further supported by the established rule that Section 2281 is to be strictly construed as a technical enactment and is not to be extended

to cases beyond its scope. *Beal* v. *Holcombe*, (C.A. 5th, 1951) 193 F. 2d 384, 388; *Phillips* v. *U. S.*, 312 U.S. 246, 250, 61 S. Ct. 480, 483, 85 L. Ed. 800, 804.

Rule 54 (c), Rules of Civil Procedure, has no application here. That rule merely provides that a final judgment shall grant the relief "to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." In the first place, in the present case, an injunction was not sought and, in any event, could not have been granted by a single-judge district court; therefore, it cannot be said that plaintiff was "entitled" to such relief. Secondly, the rule does not include relief as to a matter not made out in the pleadings or proof, and relief which a party does not desire will not be forced upon him. *Mercury Oil Refining Co.* v. *Oil Workers International Union, CIO*, (C.A. 10, 1951) 187 F. 2d 980, 983.

The case of *Federal Housing Administration* v. *The Darlington*, 3 L. Ed. 2d 132, 79 S. Ct. 141, and 352 U.S. 977, 1 L. Ed. 2d 363, 77 S. Ct. 381, is not pertinent here. Appellant omits to point out that in that case the plaintiff not only sought a declaratory judgment but also specifically sought an injunction. See *The Darlington, Inc.*, v. *Federal Housing Administration*, 134 F. Supp. 337, 338, and 154 F. Supp. 411.

The controlling fact in the present case is that 28 U.S.C., Section 2281, applies only where an interlocutory or permanent injunction restraining the enforcement, operation or execution of a State statute by restraining the action of any officer of such State is sought and granted. No injunction whatsoever was sought or granted in the present case, and no officer of the State was made a party or restrained or sought to be restrained by any injunction.

WHEREFORE, appellee respectfully submits that the motion should be denied.

II.

In an *amici curiae* brief filed after the expiration of the time for filing briefs on the jurisdictional question, four Mississippi municipalities contend that it would be appropriate for this Court to forego an orderly disposition of this appeal because of a suit filed in the name of the City of Gulfport, Mississippi, against appellee in the State court on January 12, 1959 (see Appendix), some two and one-half years after the commencement of the present suit.*

Under the circumstances, it is too obvious for doubt that this belated suit was brought in an attempt to afford some basis for a point not raised or urged upon this Court in appellant's Jurisdictional Statement or in either of the courts below.

We recognize that, under certain circumstances, and as a matter of comity, a Federal court may stay an action involving a State statute in order to permit a preliminary construction of the statute by a State court, where the statute is suscepitble of a construction which would avoid constitutional invalidity.

We submit, however, that the discretionary rule as to stay of proceedings pending a preliminary construction by a State court does not apply in a situation where, as is the case here, the construction and applicability of the State statute is not controverted by either party.

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*The suit filed by the City of Gulfport in the Chancery Court of Harrison County, Mississippi (No. 40,667), has been removed to the United States District Court for the Southern Division on the grounds of diversity of citizenship and existence of the requisite amount in controversy.

In the present case there is no dispute as to the construction of the State statute (Sec. 5e, Chapter 372, Miss. Laws of 1956), which is under attack. There is not involved a construction or determination of the applicability of the State statute. Indeed, appellant has asserted throughout the case (including its brief in the Court of Appeals, page 88) that there is no question as to the meaning and applicability of the State statute; both courts below have treated the statute as applicable; and this construction has been accepted by both parties.

Remission to the State court would result in substantial delay and expense and would serve no useful purpose.

Under such circumstances, the rule as to stay of proceedings should not be applied. *City of Chicago* v. *Atchison, Topeka and Santa Fe Railway Co.*, 357 U.S. 77, 84, 2 L. Ed. 2d 1174, 1180, 78 S. Ct. 1063.

*Meredith* v. *City of Winterhaven*, 320 U.S. 228, 88 L. Ed. 9, 64 S. Ct. 7, cited by *amici* does not support their position. In that case the Court did exercise its jurisdiction. The *Pullman Company* and *Fieldcrest Dairy* cases, cited in the quotation by appellant from the *Winterhaven* case, both involved the necessity of a preliminary State Court determination of the meaning of a State law. The *Magnolia Petroleum* case therein cited involved solely a question of state property law, although Federal jurisdiction arose under the Bankruptcy Act. See *Propper* v. *Clark*, 337 U.S. 472, 489, 93 L. Ed. 1480, 1494, 1495.

Mississippi has no declaratory judgment procedure whereby appellee can obtain an uthoritative judicial declaration as to its rights under the State grant here involved. For such a case, the Federal Declaratory Judgment Act is made to order. Appellee should not be denied the relief afforded by that statute especially where, as

here, the District Court's jurisdiction was invoked on the grounds of diversity of citizenship and the requisite jurisdictional amount.

We submit that there is neither logic, equity nor justice in permitting a litigant, after two and a half years of litigation in the Federal Courts, involving the constitutionality of a State statute, *under both the Federal and State Constitutions*, suddenly to decide that he would prefer to have the matter first decided by a State Court. The mischievous results that would flow from the adoption of such a rule are as real as they are obvious.

## CONCLUSION.

Appellee respectfully submits that the appeal should be dismissed, or in the alternative, that the case should be affirmed.

Respectfully submitted,

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*Of Counsel.*

## CERTIFICATE OF SERVICE.

I, Charles B. Snow, attorney of record for appellee, hereby certify that I have this day mailed to Honorable Thomas Y. Minniece and Honorable Lester E. Wills, attorneys for appellant, both of Meridian, Mississippi, a true and correct copy of the above brief. I further certify that a true and correct copy of the above brief has been mailed to Honorable Charles R. Galloway, Gulfport, Mississippi, Honorable Thomas J. Wiltz, Biloxi, Mississippi, Honorable Louis Alford, McComb, Mississippi, and Honorable Tally D. Riddell, Quitman, Mississippi, attorneys for *amici curiae*.

This the ..... day of ....., 1959.

.....

CHARLES B. SNOW.

# APPENDIX

## STATE OF MISSISSIPPI

### In the Chancery Court of Harrison County

I, C. J. Darby, Clerk of the Chancery Court of Harrison County, Mississippi, do hereby certify that the said suit styled, CITY OF GULFPORT, A MUNICIPAL CORPORATION, VERSUS SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY and numbered 40667 on the general dockets of the Chancery Court of Harrison County, Mississippi, was filed on the 12th day of January, 1959, and that it had not been previously filed;

I do hereby further certify that I am the official custodian of all records and papers of said Chancery Court of Harrison County, Mississippi;

AND I FURTHER CERTIFY that said Chancery Court is a Court of Record with an official seal, and that I, as Clerk of said Chancery Court, am the custodian of the records and of the seal of said Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this said court, at the CITY OF GULFPORT, on this 19th day of January, in the year of our Lord, one thousand nine hundred and fifty nine.

/s/ C. J. Darby,

(Seal)

Clerk of the Chancery Court of Harrison County, Mississippi.

THE STATE OF MISSISSIPPI

I, William G. Hewes, sole presiding Chancellor of the Eighth Chancery Court District of the State of Mississippi (said District including the County of Harrison) do hereby certify that C. J. DARBY, whose genuine signature appears to the annexed and foregoing attestation, is now, and was at the date thereof, the clerk of the Chancery Court of Harrison County, in said State, duly elected and qualified, and that his said attestation is in due form.

Witness my signature, this the 19th day of January, A. D. 1959.

/s/ William G. Hewes,
Chancellor.

THE STATE OF MISSISSIPPI
Harrison County

I, the undersigned Clerk of the Chancery Court of the county of Harrison in said State (said Court being a court of record, and having an official seal), do hereby certify that William G. Hewes, whose genuine signature appears to the annexed and foregoing attestation, is now, and was at the date thereof, the sole presiding Chancellor of the Eighth Chancery Court District of said State, which said District includes the said county of Harrison, and that said William G. Hewes, as aforesaid, is now, and was at the date of said attestation, duly commissioned and qualified.

Given under my hand and seal of office, at Gulfport, Mississippi, this the 19th day of January, A. D. 1959.

/s/ C. J. Darby,
Clerk.

(Seal)